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Supreme Court of the United States.

Nos. 657, 658, 659 and 660.

OCTOBER TERM, 1932.

FEDERAL RADIO COMMISSION AND JOHNSON-KENNEDY RADIO CORPORATION (Station WJKS), *Petitioners,*

vs.

NELSON BROTHERS BOND & MORTGAGE COMPANY (Station WIBO), *Respondent.*

FEDERAL RADIO COMMISSION AND JOHNSON-KENNEDY RADIO CORPORATION (Station WJKS), *Petitioners,*

vs.

NORTH SHORE CHURCH (Station WPCC), *Respondent.*

ON PETITION FOR WRITS OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

OPINION BELOW.

The opinion of the Court of Appeals of the District of Columbia (R. 1138-1147) is not yet reported.

JURISDICTION.

The petition, on behalf of the Federal Radio Commission, invokes jurisdiction of this Court on the ground that the Court of Appeals of the District of Columbia "reversed an order of the Federal Radio Commission refusing to renew the respondents' broadcasting licenses and granting the application of a third station for the use of the frequency now assigned to the respondents." The record (R. 46) shows that it was petitioner Johnson-Kennedy Radio Corporation whose application was before the Federal Radio Commission and not the application of respondents; that it was an application for a *modification* of the license of Johnson-Kennedy Radio Corporation because its present assignment "is unsuitable to properly cover its normal service area because of absorption due to steel mills;" and that it was an application by said Johnson-Kennedy Radio Corporation to "remove" Stations WIBO and WPCC, respondents herein. (R., p. 44, par. (1), lines 4 and 5.)

Jurisdiction is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 16 of the Radio Act of 1927, as amended by the Act of July 1, 1930, c. 788, 46 Stat. 844.

QUESTION PRESENTED.

The question is not whether the Federal Radio Commission is authorized to decline to renew a license, but whether the Federal Radio Commission is authorized to destroy two "meritorious stations, serving public interest, convenience and necessity," as found by the Court of Appeals, by granting the modification asked for by ptitioners and thus working a "forfeiture of the facilities now assigned to stations WIBO and WPCC," respondents. (R. 1138, last paragraph and p. 1139.)

STATUTES INVOLVED.

The petition sets forth some of the statutes involved as being pertinent. Respondent refers herein, in the appropriate places, to additional statutes, i.e., Section 14 of the Radio Act of 1927 (c. 169, 44 Stat. 1168); Section 240 (a) of the Judicial Code; and parts of the Act of March 28, 1928, known as the Davis Amendment not printed by petitioner as pertinent. These statutes are printed in the appendix hereto.

STATEMENT.

The petitioner, Federal Radio Commission (Nos. 657 and 658) seeks to have reviewed in this Court, by *certiorari* to the Court of Appeals of the District of Columbia, a decision of that Court.

The petitioner, the Johnson-Kennedy Radio Corporation (Nos. 659 and 660), "adopts" the petitions filed by the Federal Radio Commission in numbers 657 and 658. The Johnson-Kennedy Radio Corporation was

the applicant before the Commission and an intervener in the Court of Appeals. In this brief we will refer to "the petitioners," in our discussions, except where the Federal Radio Commission alone is alluded to, when petitioner will be referred to as the Commission, or where the petitioner, Johnson-Kennedy Radio Corporation alone is dealt with, in which case we will refer to that petitioner as "Station WJKS."

Petitioners state that the decree of the Court of Appeals

> "reversed an order of the Federal Radio Commission refusing to renew the respondents' broadcasting licenses."

That statement is inaccurate. In their "Statement," however, the petitioners correctly set forth that Station WJKS, operating at Gary, Indiana, upon the frequency of 1360 kc., filed with the Commission its application for *modification* of its then license, and that, as amended, this application requested the frequency 560 kc., and requested that if the Commission's order would require the "removal" of a station or stations, stations WIBO and WPCC, operated respectively by the respondents herein, should be removed. No charges were made against respondents.

Petitioners' statement then sets up the *findings* of the Commission as the petitioners *summarize* them. This is a summary of a brief of the evidence in the case filed by petitioner WJKS before the Commission as part of its exceptions to the findings of the examiner.

Part of the petitioners' statement consists of Conclusions of the Commission as to why stations WIBO

and WPCC, operated by respondents, should be "deleted." Petitioners show that the Court of Appeals of the District of Columbia reversed the order of the Commission. Respondents here point out that the Court of Appeals found that the decision of the Commission was arbitrary and capricious.

REASONS FOR DENYING THE WRITS.

This Court has no jurisdiction to grant writs of *certiorari* to review the decision of the Court of Appeals of the District of Columbia revising a decision of the Federal Radio Commission.

Federal Radio Commission vs. General Electric Co., 281 U. S. 464.

Petitioners purport to invoke the Court's jurisdiction under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. That section provides:

> "In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by *certiorari*, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal." (Chap. 229, 43 Stat. L. 936, 938, 939, U. S. C. title 28, sec. 347.)

Before this Court can acquire jurisdiction there must be a *case*. The proceeding before the Commission, the decision in which was reversed by the Court of Appeals, was not a case.

Federal Radio Commission vs. General Electric Co., supra; Great Lakes Broadcasting Co. vs. Federal Radio Commission, 281 U. S. 706.

The statute creating the Commission, and the subsequent statutes, including the Davis Amendment here involved, conferred upon the Commission administrative powers and upon the Court of Appeals supervisory powers over the Radio Commission in carrying out legislative functions. As said by this Court in *Federal Radio Commission vs. General Electric Co., supra*, 281 U. S. 464, 467:

> "We think it plain from this resumé of the pertinent parts of the (Federal Radio) Act that the powers confided to the Commission respecting the granting and renewal of station licenses are purely administrative and that the provision for appeals to the court of appeals does no more than make that court a superior and revising agency in the same field."

In *Postum Cereal Co. vs. California Fig Nut Co.*, 272 U. S. 693, in considering the administrative powers thus exercised by the Court of Appeals of the District of Columbia over the decisions of the Commissioner of Patents, this Court said:

> "It is merely an instruction to the Commissioner of Patents by a court which is made part of the machinery of the Patent Office for administrative purposes. In the exercise of such

> function it does not enter a judgment binding the parties in a case as the term 'case' is used in the third article of the Constitution." * * * "This result prevents an appeal to this Court, which can only review judicial judgments."

And at page 700:

> "The distinction between the jurisdiction of this court which is confined to the hearing and decision of cases in the constitutional sense and that of administrative action and decision, power for which may be conferred upon the courts of the District, is shown in the case of Keller vs. Potomac Electric Power Co., 261 U. S. 428."

In the instant case the decision of the Court of Appeals is not a "judicial" judgment which binds the parties in a case. The Court remands the case to the Radio Commission and the Commission makes the order binding the parties in so far as administrative action on them is concerned. The Court of Appeals, for the purpose of the appeal to it, is merely a part of the machinery of the Radio Commission and its decision is an administrative decision.

The petition further purports to invoke jurisdiction of this Court under the amendment of the Radio Act made by the Act of July 1, 1930 (46 Stat. 844). The latter Act amended Section 16 of the Radio Act only. The pertinent provision of the amendment is:

> "(a) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia * * *.
>
> (d) * * * The court's judgment shall be final,

> subject, however, to review by the Supreme Court of the United States upon writ of *certiorari* on petition therefor under section 347 of title 28 of the Judicial Code by appellant, by the Commission, or by any interested party intervening in the appeal."

It will be noted, therefore, that jurisdiction is invoked because the amendment purports to give this Court jurisdiction to review what it has termed an administrative function of the Radio Commission and a supervisory function of the Court of Appeals.

No amendment to the Federal Radio Act has changed the duties and powers of the Radio Commission so as to make the functions of the commission anything different from the administrative functions as they existed at the time this Court decided the case of the *Commission vs. General Electric Co., supra.* The only ground on which jurisdiction is attempted to be invoked is that the amendment of July 1, 1930, gives this Court the right to review the proceedings.

The jurisdiction of this Court, however, is constitutional, and where the Constitution does not confer jurisdiction the Congress cannot do so. In the *General Electric Co.* case, *supra* (281 U. S. 464, 468), this Court said:

> "In the cases just cited, as also in others, it is recognized that the courts of the District of Columbia are not created under the judiciary article of the Constitution but are legislative courts, and therefore that Congress may invest them with jurisdiction of appeals and proceedings such as have been just described.
>
> *But this court can not be invested with jurisdiction of that character,* whether for purposes

of review or otherwise. It was brought into being by the judiciary article of the Constitution, is invested with judicial power only and can have no jurisdiction other than of *cases and controversies* falling within the classes enumerated in that article. It cannot give decisions which are merely advisory; nor can it exercise or participate in the exercise of functions which are essentially legislative or administrative. *Keller vs. Potomac Electric Power Co., supra* (261 U. S. 444, 67 L. Ed. 736, 43 Sup. Ct. Rep. 445), and cases cited; *Postum Cereal Co. vs. California Fig Nut Co., supra* * * *."

In Ex parte Bakelite Corporation, 279 U. S. 438, jurisdiction of this Court was invoked to review action of the United States Tariff Commission, on the ground that Congress had expressly provided, in the Tariff Act of 1922, for a review by this Court of a decision of the Court of Customs Appeals, but this Court said (*loc cite* 447):

"There is also a provision purporting to subject the decision of that court to review by this court upon *certiorari*.

* * * * * *

The present petitioner * * * filed with the Tariff Commission a sworn complaint. * * * The Commission entertained the complaint, gave public notice thereof and conducted a hearing. * * * The Commission made findings sustaining the charge * * *. The importers appealed to the Court of Customs Appeals, where the Bakelite Corporation challenged the court's jurisdiction on constitutional grounds. The court upheld its jurisdiction, and announced its purpose to entertain the appeal. Thereupon the Bakelite

Corporation presented to this Court its petition for a writ of prohibition. * * *
The grounds on which the jurisdiction of the Court of Customs Appeals was challenged in that court, and on which a writ of prohibition is sought here, are:

1. That the Court of Customs Appeals is an inferior court created by Congress under section 1 of article 3 of the Constitution, and, as such, it can have no jurisdiction of any proceeding which is not a case or controversy within the meaning of section 2 of the same article.
2. That the proceeding presented by the appeal from the Tariff Commission is not a case or controversy in the sense of that section but is merely an advisory proceeding in aid of executive action.

* * * * * *

While Article 3 of the Constitution declares, in section 1, that the judicial power of the United States shall be vested in one Supreme Court and in 'such inferior courts as the Congress may from time to time ordain and establish; and prescribes in section 2, that this power shall extend to cases and controversies of certain enumerated classes, it long has been settled that article 3 does not express the full authority of Congress to create courts, and that other articles invest Congress with powers in the exertion of which it may create inferior courts and clothe them with functions deemed essential or helpful in carrying those powers into execution. But there is a difference between the two classes of courts. Those established under the specific power given in section 2 of article 3 are called constitutional courts. They share in the exercise of the judicial power defined in that section, can be in-

vested with no other jurisdiction, and have judges who hold office during good behavior, with no power in Congress to provide otherwise. On the other hand, those created by Congress in the exertion of other powers are called legislative courts. Their functions always are directed to the execution of one or more of such powers and are prescribed by Congress independently of section 2 of article 3; and their judges hold for such time as Congress prescribes, whether it be a fixed period of years or during good behavior.

The first pronouncement on the subject by this court was in *American Insurance Co. vs. 356 bales of Cotton*, 1 Pet. 511, * * * where the status and jurisdiction of courts created by Congress for the Territory of Florida were drawn in question. Chief Justice Marshall, speaking for the court, said:

> 'These courts, then, are not constitutional courts, in which the judicial power conferred by the Constitution on the general government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the third article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States.'

That rule has been accepted and applied from

that time to the present in cases relating to territorial courts.

A like view has been taken of the status and jurisdiction of the courts provided by Congress for the District of Columbia. These courts, this court has held, are created in virtue of the power of Congress 'to exercise exclusive legislation' over the district made the seat of the government of the United States, are legislative courts rather than constitutional courts, and may be clothed with the authority and charged with the duty of giving advisory decisions in proceedings which are not cases or controversies within the meaning of article 3, but are merely in aid of legislative or executive action, and therefore outside the admissible jurisdiction of courts established under that article."

In *Crowell vs. Benson,* 285 U. S. 22, 49, this Court, in considering an appeal from the U. S. Employee's Compensation Commission, quoting from *Den ex dem Murray vs. Hoboken Land & Dev. Co.,* 18 How. 272, said:

> "To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination."

See also Daniel Gordon et al. vs. U. S., 117 U. S. 697.

In *Keller vs. Potomac Electric Power Co.,* 261 U. S. 428, this Court held that while Congress can confer upon the courts of the District of Columbia power to

review the legislative discretion of the Public Utilities Commission and thus give the court authority to revise the legislative discretion of the Commission, the Congress cannot confer power upon the Supreme Court of the United States to review, on appeal from another reviewing court, such legislative discretion, so as to enable it to consider the facts and make the order which the commission should have made.

In that case the Act of Congress provided that:

> "Any party, including said commission, may appeal from the order or decree of said court to the Court of Appeals of the District of Columbia, and therefrom to the Supreme Court of the United States, which shall thereupon have and take jurisdiction."

This Court in passing upon that attempt to confer jurisdiction, said (*loc cite* 444):

> "This court is, therefore, given jurisdiction to review the entire record, and to make the order or decree which the Commission and the District courts should have made.
>
> Such legislative or administrative jurisdiction, it is well settled, cannot be conferred on this court either directly or by appeal. The latest and fullest authority upon this point is to be found in the opinion of Mr. Justice Day, speaking for the court in Muskrat vs. United States, 219 U. S. 346, 55 L. Ed. 246, 31 Sup. Ct. Rep. 250. The principle there recognized and enforced on reason and authority is that the jurisdiction of this court and of the inferior courts of the United States, ordained and established by Congress under and by virtue of the third article of the Constitution is limited to cases and con-

> troversies in such form that the judicial power is capable of acting on them; and does not extend to an issue of constitutional law framed by Congress for the purpose of invoking the advice of this court without real parties or a real case, or to administrative or legislative issues or controversies. Hayburn's Case, 2 Dall. 410, note, 1 L. Ed. 436, note; United States vs. Ferreira, 13 How. 40, 52, 14 L. Ed. 42, 47, Ex parte Siebold, 100 U. S. 371, 398, 25 L. Ed. 717, 726; Gordon vs. United States, 117 U. S. 697; Baltimore & O. R. Co. vs. Interstate Commerce Commission, 215 U. S. 216, 54 L. Ed. 164, 30 Sup. Ct. Rep. 86."

So in the instant case, if this Court had jurisdiction at all, it would be to review the entire record to determine first whether the Court of Appeals made an error of law and, secondly, whether the record consisting of some 1100 pages contained evidence to sustain the Commission, or whether the evidence showed that the action of the Commission was arbitrary and capricious; and after this Court determined the matter its decision would not be a judgment, or permit of a judgment to be made in any lower court, but would permit only of the consummation of the administrative function of issuing or withholding a permit to operate a radio station. That function is administrative.

As the amendment of the Radio Act under which jurisdiction is invoked was not in the power of Congress to enact, the situation as to the right of this Court to review the decision is precisely the same as it was when this Court dismissed the writ in the case of the *Federal Radio Commission vs. General Electric Co., supra.* Having already held in that case that Congress

cannot give it jurisdiction, dismissal of the petition herein on the authority of the cases herein cited would not invalidate any of the provisions of the Radio Act or amendments thereto dealing with the creation of the Commission and its functions under that Act and the amendments thereto. This Court held in *Keller vs. Potomac Electric Power Co., supra, loc cite,* 445:

> "The fact that the appeal to this court is invalid does not, however, render (the act there in question) invalid as a whole. Paragraph 92 of the law declares each paragraph to be independent, and directs that the holding of any paragraph or any part of it invalid shall not affect the validity of the rest."

And the Radio Act, in Section 38, makes the same provision *re* the validity of the Act as a whole in case any provision is held to be invalid.

SPECIFICATIONS OF ERROR URGED BY PETITIONERS.

As the Court has no jurisdiction to review the administrative acts of the Commission as supervised by the Court of Appeals, the errors urged by the petitioners can not be corrected by this Court, if errors there be.

However, as petitioners have set forth so fully in their "Statement," the facts as claimed by them, which statement is before this Court, respondents are constrained to answer the petitioners and point out that the Court of Appeals did not err as alleged. The specifications of error will be dealt with in the order in which they appear in the petition.

1. The Court of Appeals not only did not err in holding, but did not hold, that the Federal Radio Commission does not have the authority, under the Act of March 28, 1928, in the exercise of its licensing power, "to lessen the gross disparity existing between the broadcasting facilities of two States by granting a license to use the frequency assigned to the respondents, located in the over-quota State, to an applicant for such frequency in the under-quota State and declining to grant the license to respondents."

The Court of Appeals found (R. 1138), as the "statement" of petitioners in this Court admits to be true (p. 4, Petition herein), that station WJKS requested the "removal" of stations WIBO and WPCC; and the Court further found (R. 1139), as is borne out by the record (R. 1125) that the Commission in its decision stated the issue before it to be "the consequent forfeiture of the facilities now assigned stations WIBO and WPCC." It was not a question of "lessening gross disparity." The Court found (R. 1138, as borne out by the record (R. 1069 *et seq.*), that:

> "In the reallocation of 1928 following the enactment of the Davis amendment (act of March 28, 1928, 45 Stat. 373), the Commission found that conditions warranted the assignment of the frequency of 560 kc. to Station WIBO (originally established in April, 1925) and Station WPCC (originally established in July, 1924), and the assignment of the frequency of 1,360 kc. to Station WJKS (originally established in August, 1927). The evidence fails to disclose that there has been a material change in conditions since the reallocation of 1928."

The decision of the Court of Appeals fails to dis-

close any expression respecting authority or lack of authority to "lessen gross disparity" and no such "holding" can be here asserted as an error upon which this Court can be asked to aid petitioners in deleting stations WIBO and WPCC, or uphold their forfeiture.

2. Petitioners assert that the Court of Appeals erred in holding that the action of the Commission was an arbitrary and capricious exercise of power.

Station WJKS asked for the "removal" of respondents' stations WIBO and WPCC. The Commission declared the issue to be the "forfeiture" of stations WIBO and WPCC.

We submit that:

(a) When the Commission decided that it had the right to entertain the application to "forfeit" the facilities of other stations, it acted arbitrarily and capriciously.

Section 14 of the Radio Act (c. 169, 44 Stat. 1168) which has never been amended or repealed, reads, so far as pertinent here, as follows:

> "Any station license shall be revocable by the Commission for false statements either in the application or in the statement of fact which may be required by Section 10 hereof, or because of conditions revealed by such statements of fact as may be required from time to time which would warrant the licensing authority in refusing to grant a license on an original application, or for failure to operate substantially as set forth in the license, for violation of or failure to observe any of the restrictions and conditions of this Act, or of any regulation of the licensing authority authorized by this Act * * *. Provided that no such order of revocation shall take

> effect until thirty days' notice in writing thereof, stating the cause for the proposed revocation, have been given to the parties known by the Commission to be interested in such license. * * *."

The so-called Davis Amendment, which amended Section 9 of the said Act, provided for the allocation of licenses. It did not alter the provisions of Section 14 or repeal that section. The Act contains no provision for "removing," "deleting," "forfeiting" or "destroying" licensed stations. There is, therefore, no statutory power for the forfeiture of a station, and the Order of the Commission is not a "fair and equitable" allocation of licenses under the Davis Amendment.

(b) The Davis Amendment directs the Commission to make and maintain an equal allocation among the zones and a fair and equitable allocation within the zones. The Court of Appeals, as stated above, found that such allocation had been made in 1928 after the passage of the Davis Amendment and that the evidence fails to disclose that there has been a material change in conditions since that reallocation. To permit the Commission to again make a separate reallocation on each "request" to "remove" an established station, thus "forfeiting" it, would be to give the Commission power to act arbitrarily and capriciously. Finding no substantial evidence in the record showing a change in conditions since the facilities were allocated to respondents' stations in 1928, the Court of Appeals was obviously justified in finding that the Commission's Order resulting in the forfeiture of those facilities was arbitrary and capricious.

(c) The Court of Appeals is the final supervisory power. As stated in *Keller vs. Potomac Electric Power Co., supra* (261 U. S. 428, 444):

> "It (the act of Congress) brings the court much more intimately into the legislative machinery * * *. We cannot escape the conclusion that Congress intended that the court shall revise the legislative discretion of the Commission by considering the evidence and full record of the case, and entering the order it deems the Commission ought to have made."

Under the Radio Act the court does not enter the order; it remands the case to the Commission to carry out the court's judgment, but it is the legislative discretion of the court that is carried out. The court must examine the entire record before it can determine whether the facts found by the Commission, even if supported by substantial evidence, make the findings, i. e. the conclusions, of the Commission arbitrary and capricious. As stated in *Crowell vs. Benson, supra* (285 U. S. 22), this Court said:

> "The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, to estab-

> lish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts and *finality as to facts becomes, in effect, finality in law.*"

In the instant case the Congress has given the Court of Appeals of the District of Columbia the jurisdiction to review not only questions of law, which must include questions where "finality as to facts becomes, in effect, finality in law," but jurisdiction to reverse the decision of the Commission where the "findings" of the Commission are arbitrary and capricious.

The Court of Appeals decided (R. 1141):

> "The question, therefore, in this case is whether the decision of the commission assigning to the applicant station the frequency enjoyed by Stations WIBO and WPCC since 1928 'and the subsequent forfeiture' of the assignment held by Stations WIBO and WPCC is a reasonable exercise of regulatory power or an arbitrary and capricious assertion of power.
>
> Station WIBO was established in April, 1925, and represents a total cost of about $346,000, less a reserve for depreciation of about $54,000. It employs 55 persons; has monthly operating expenses of from $16,000 to $18,000. It serves a radius of from 50 to 100 miles and, on the basis of its earnings, is estimated to be worth between $500,000 and $700,000. There is not even a suggestion that it has failed to comply in any respect with the regulations of the commission; on the contrary, it affirmatively appears that this station has been operated in the public interest.
>
> Station WPCC was established in July, 1924,

and is owned by the North Shore Church of Chicago. Prior to the installation of this broadcasting station, the church was largely in debt. The installation of the radio greatly increased the church's audiences. There are 20 radio stations in Chicago broadcasting about sixty hours of religious programs on Sundays, but there are practically no week-day spiritual programs broadcast except those of station WPCC. That the operation of this station has been in the public interest, clearly appears.

* * * * * *

We have repeatedly held that 'it would not be consistent with the legislative policy to equalize the comparative broadcasting facilities of the various states or zones by unnecessarily injuring stations already established which are rendering valuable services to their natural service areas.' Reading Broadcasting Co. vs. Fed. of Radio Comm., 60 App. D. C. 89, 48 F. (2d) 458; Chicago Fed. of Labor vs. Fed. Radio Comm., 59 App. D. C. 333, 41 F. (2d) 422.

* * * * * *

Station WIBO had been broadcasting for more than two years, and station WPCC more than three years, when station WJKS entered the field. The only apparent reason for granting the application of station WJKS and destroying the other two stations is that Indiana is underquota, which in the circumstances furnishes no substantial justification for the decision of the commission. As already observed, the evidence discloses that station WIBO and WPCC have been and are 'serving public interest, convenience, and necessity' certainly to as great an extent as the applicant station. In our view, the conclusively established and admitted facts furnish no legal basis for the de-

cision of the commission. In other words, the decision is in a legal sense arbitrary and capricious."

Specifications 3, 4 and 5 urged as error by petitioners allege that the Court of Appeals erred in relying on certain findings of the examiner which petitioners claim are inconsistent with the findings of the commission. The language of the opinion of the Court of Appeals thus complained of is as follows:

> "After a careful review of the established facts, the examiner recommended that the application be denied. He found that the station is rendering a commendable public service on its present part-time assignment, but that the service 'would be improved by the installation of the most modern radio equipment and the operation of this station in the most efficient manner on its present frequency.' He further found that it is possible that 'more objectionable interference would result from the operation of station WJKS on the 560 kc. channel than now results from the operation of this station at Gary on the 1,360 kc. channel, since station WNOX at Knoxville, Tenn., is separated from Gary by a distance of only 440 miles, whereas the nearest station on applicant's present assigned frequency operating with 1 kw., is at Syracuse, N. Y., separated from Gary by a distance of 600 miles.' He also found that Stations WIBO and WPCC 'are meritorious stations, serving public interest, convenience and necessity'; that 'the owners and operators of these stations have at great cost prepared themselves to exercise the broadcasting privileges heretofore granted them by the Federal Radio Commission, and in the opinion of the examiner, clear and sound reasons of

> public policy demand that these broadcasting privileges be not taken from them and assigned to applicant station'; that stations WIBO and WPCC provide radio service for people within the service area of the applicant station, who also 'receive a large proportion of their radio broadcasting service from stations operating in the State of Illinois, *none of which service may be charged against the quota of the State of Indiana.*' (R. 1138-9).

A reading of the Court's opinion discloses that the aforesaid language was used by the Court merely as part of its statement of the various steps which had been taken in the case before it reached the Court.

The opinion does not show that the Court relied on said findings of the examiner. On the contrary, the Court's opinion discloses that on an examination of the entire record the Court found that the order of the Commission forfeiting respondents' stations WIBO and WPCC was arbitrary and capricious. This finding of the Court, as shown in connection with the answer herein to petitioner's specification No. 2 is fully sustained by the record.

The specification that the Court erred in reversing the order of the Commission is, therefore, without foundation.

In the "Reasons for granting the writs," petitioners state, first, that the case presents a question of public importance which should be decided by the Court because it involves the construction of the Davis Amendment pertaining to the manner in which broadcasting facilities should be allocated and that it is the first case involving the affirmative application of the Act by the Commission.

The difficulty is that the question is not here presented by a *case*. The administrative supervisory power, the Court of Appeals, has heretofore considered the question involving the affirmative application of the Davis Amendment and has determined it.

> *Technical Radio Laboratory vs. Federal Radio Commission*, 59 App. D. C. 125;
> *City of New York vs. Federal Radio Commission*, 59 App. D. C. 129;
> *Chicago Federation of Labor vs. Federal Radio Commission*, 59 App. D. C. 333;
> *KFKB Broadcasting Ass'n. vs. Federal Radio Commission*, 60 App. D. C. 81;
> *WHB Broadcasting Co. vs. Federal Radio Commission*, 56 Fed. (2nd) 311;
> *Durham Life Insurance Co. vs. Federal Radio Commission*, 60 App. D. C. 375.

The second reason urged by the petitioners for granting the writs is that:

> "It is essential to the proper discharge of the Commission's duties that this Court should determine whether the Commission may refuse to renew licenses and thereby curtail the facilities of existing stations, in order to bring about a fair distribution of broadcasting facilities among the States, as provided in the Davis Amendment. Substantially the same question is involved in 116 separate proceedings pending before the Federal Radio Commission, in which applications have been filed requesting, in each case, the reassignment to an underserved State or zone of all or a substantial part of the fa-

cilities now licensed to a station in an over-quota State or zone."

The third reason advanced by petitioners, as to why the writs should be granted, is that the lower court placed an erroneous construction upon the language of the Davis Amendment.

The Court of Appeals found that the evidence fails to disclose a material change in conditions in the zone here involved since broadcasting facilities were reallocated under the Davis Amendment in 1928 so as to now justify the forfeiture of the facilities then allocated to respondents' stations WIBO and WPCC. The Court's decision was on the facts of this case and no decision on those facts can be controlling in any of the 116 other cases now pending.

If there are 116 other cases pending in which the only question involved is the right of the Commission to forfeit stations because competitors have applied for their facilities, this Court should end the suspense of the operating stations there involved by denying the writ here applied for, on the authority of *Federal Radio Commission vs. General Electric Co., supra,* and similar decisions cited herein.

The granting of the writ here applied for would delay the mandate of the Court of Appeals to the Commission, and until such mandate goes to the Commission, delay in the Commission's dismissal of the application to remove respondent's stations and the pending applications of competitors for the forfeiture of the 116 other operating stations affects the orderly conduct of the business of those stations and works irreparable financial hardship on them.

be a precedent for the Commission in determining applications of others who wish meritorious stations removed from the air.

This Court having no jurisdiction to review the decision of the Court of Appeals in any event, it is respectfully submitted that the writs should be denied.

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APPENDIX.

Statutes Involved.

Section 240 (a), Judicial Code:

> "In any *case*, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal." (Chap. 229, 43 Stat. L. 936, 938, 939, U. S. C. title 28, sec. 347).

Section 14, Radio Act of 1927 (c. 169, 44 Stat. 1168).

> "Any station license shall be revocable by the Commission for false statements either in the application or in the statement of fact which may be required by section 10 hereof, of because of conditions revealed by such statement of fact as may be required from time to time which would warrant the licensing authority in refusing to grant a license on an original application, or for failure to operate substantially as set forth in the license, for violation of or failure to observe any of the restrictions and conditions of this Act, or of any regulation of the licensing authority authorized by this Act * * *. Provided that no such order of revocation shall take effect until thirty days' notice in writing thereof,

stating the cause for the proposed revocation, have been given to the parties known by the Commission to be interested in such license * * *."

Section 16, Radio Act of 1927, as amended by the Act of July 1, 1930, known as the Davis Amendment (46 Stat. 844).

"(a) An appeal may be taken in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia * * *.

(d) * * * The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 347 of title 28 of the Judicial Code by appellant, by the commission, or by any interested party intervening in the appeal."

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In The

Supreme Court of the United States.

Nos. 657, 658, 659 and 660.

October Term, 1932.

Federal Radio Commission and Johnson-Kennedy Radio Corporation (Station WJKS), *Petitioners,*

vs.

Nelson Brothers Bond & Mortgage Company (Station WIBO), *Respondent.*

Federal Radio Commission and Johnson-Kennedy Radio Corporation (Station WJKS), *Petitioners,*

vs.

North Shore Church (Station WPCC), *Respondent.*

On Writs of Certiorari to the Court of Appeals of the District of Columbia.

BRIEF FOR RESPONDENTS.

OPINION BELOW.

The opinion of the Court of Appeals of the District of Columbia (R. 1138-1147) is reported in 62 F. (2d) 854.

JURISDICTION.

The petitioners invoke jurisdiction of this Court under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 16 of the Radio Act of 1927, as amended by the Act of July 1, 1930, c. 788, 46 Stat. 844.

The amendment made by the Act of July 1, 1930, added to the Radio Act as heretofore considered by this Court in *Federal Radio Commission vs. General Electric Co.*, 281 U. S. 464, the following provision:

> "The Court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari upon petition therefor under section 347 of Title 28 of the Judicial Code * * *."

Respondents here urge, as they urged in their brief in opposition to the granting of the writ, that this Court has no jurisdiction to entertain the review asked for by petitioners, and reference is hereby made to the brief in opposition for a full statement of reasons why this Court should not review the case. The amendment purporting to give this Court jurisdiction is an attempt on the part of Congress to create a jurisdiction which this Court in *Federal Radio Commission vs. General Electric Co., supra,* has held the Congress could not confer upon this Court (respondent's brief in op-

position herein, page 8). But the amendment does not change the nature of the powers and functions of the Commission from being purely administrative in character. As was said in the General Electric case, *supra:*

> "In the cases just cited, as also in others, it is recognized that the courts of the District of Columbia are not created under the judiciary article of the Constitution but are legislative courts, and therefore that Congress may invest them with jurisdiction of appeals and proceedings such as have been described.
>
> "But this court can not be invested with jurisdiction of that character, whether for purposes of review or otherwise. * * * It cannot give decisions which are merely advisory; nor can it exercise or participate in the exercise of functions which are essentially legislative or administrative."

This same rule was laid down by the Court in the case of *Keller vs. Potomac Electric Power Co.*, 261 U. S. 428, where this Court was declared by Congress to have jurisdiction on appeal from the Court of Appeals of the District of Columbia in cases arising before the Public Utilities Commission. The Court said:

> "This court is, therefore, given jurisdiction to review the entire record, and to make the order or decree which the Commission and the District courts should have made.
>
> "Such legislative or administrative jurisdiction, it is well settled, cannot be conferred on this court, either directly or by appeal."

If the Supreme Court should review the instant case and enter an order in the matter, that order could only

affect the issuance or withholding of a permit, which is an administrative matter.

It is evident that Congress was not satisfied to vest in the Radio Commission—an executive body—plenary power. Apparently Congress felt that in so important a matter as allocating the limited number of wave lengths and in giving the great economic advantages to selected men or groups, it did not have complete confidence that the Radio Commission might not abuse the authority. The provision which made the Court of Appeals an administrative court of appeal manifested that fear of bureaucracy which in this and other countries at all times has been a justifiable apprehension of the legislative body. While they may have been content to invest large and important powers in the Radio Commission, they may have recalled the line of Shakespeare, which tells us of

> "Man, proud Man!
> Dressed in a little brief authority
> Most ignorant of what he is most assured,
> His glassy essence."

and therefore preferred to prevent injustice or favoritism by instituting another body, not identified with the bureaucracy, which would determine whether the findings of the Commission were justified by substantial evidence, and whether the action, under all the circumstances of a given case, was capricious or arbitrary.

Petitioners contend that since the amendment of the Act petitioner WJKS by applying for additional facilities made a *case* so that this Court can now review the decision of the Commission, and that this review is comparable to the review by this Court of a decision

of a Court of Appeals which has reviewed a decision of the Board of Tax Appeals. In this contention petitioners have overlooked the distinction made by this Court in the *Federal Radio Commission vs. General Electric Co.* case, *supra*, where the Court said, *loc cite*, 469:

> "The proceeding on the appeal, from the (Radio) Commission's action is quite unlike the proceeding, under sections 1001(a)-1004(b) of the Revenue Act of 1926, chapter 27, 44 Stat. at L. 109, U. S. C. title 26, sections 1224-1227, on a petition for the review of a decision of the Board of Tax Appeals; for, as this court heretofore has pointed out, such a petition (a) brings before the reviewing court the United States or its representative on the one hand and the interested taxpayer on the other, (b) presents for consideration either the right of the United States to the payment of a tax claimed to be due from the taxpayer, or his right to have refunded to him money which he has paid to satisfy a tax claimed to have been erroneously charged against him, and (c) calls for a judicial and binding determination of the matter so presented—all of which makes the proceeding a case or controversy within the scope of the judicial power as defined in the judiciary article."

The case of *Old Colony Trust Co. vs. Commissioner of Internal Revenue*, 279 U. S. 716, cited by petitioner, is also cited by the Court in its distinction above made. This Court also refers in the *General Electric Co.* case to the distinction between cases under the Interstate Commerce Act and cases under the Radio Act; and the same distinction between cases under the Federal Trade Commission Act and cases under the Radio Act.

The Interstate Commerce Act and the Federal Trade Commission Act provide for making the Government a party to a case.

Road District vs. St. L. S. W. Ry. Co., 257 U. S. 547, cited by petitioners as authority for the jurisdiction, was a case between a county, for taxes, and a taxpayer, as is a case between the United States and one of its taxpayers in a proceeding before the Board of Tax Appeals. In *Federal Trade Commission vs. Klesner*, 274 U. S. 145, and in the same case in 280 U. S. 19, cited by petitioners, the Congress provided that the Commission, *by bringing a complaint in court*, could try out the question of enforcing an order made by it. The Federal Trade Commission was a party to a case. So the Interstate Commerce Commission is a party to cases where it is brought in as a party or files a petition as a party, in an original case in court, as is provided by the statutes. And where it is not a proceeding such as makes it a party to a case the Interstate Commerce Commission's acts can not be reviewed. *U. S. vs. Los Angeles & S. L. Ry. Co.*, 273 U. S. 299.

On page 14 of WJKS brief (footnote) the statement is made that jurisdiction attaches in a proceeding affecting rights in themselves appropriate subjects of judicial cognizance or a wrong to be redressed or prevented. The case of *Liberty Warehouse Co. vs. Grannis*, 273 U. S. 70, is cited. That case arose under a declaratory Judgment Law of Kentucky. The Court held that there was no jurisdiction and held that the *Muskrat* case controlled on the principle that there must be an actual controversy, arising between adverse litigants, duly instituted in a *court* of proper jurisdiction. In the instant case the three stations were not adverse litigants before a court in a proceeding instituted in court.

Interstate Commerce Commission vs. Brimson, 154 U. S. 447, is also cited. In that case the Commission was a litigant in the court by a bill filed therein. The proceeding on which the Court was acting there was not the proceeding which was pending before the Commission but was a proceeding on a bill filed to compel a witness to testify in the proceeding before the Commission. It was an independent bill having nothing to do with the matter being investigated, but only dealing with the right of the Commission to enforce the presence of witnesses.

WJKS argues that the amendment of July 1, 1930, was enacted because of the decision in the General Electric Co. case. This argument has no force if Congress had no power, by the amendment, to confer jurisdiction. In the Bakelite case this Court held that the provision in the Tariff Act of 1922, purporting to grant jurisdiction in this Court to review acts of the Commerce Court, was ineffective.

The case of *White vs. Federal Radio Commission,* 29 F. (2d) 113, was a case wherein a bill in equity, for an injunction, was filed by the licensee and this Court refused to entertain the case on certificate from the Court of Appeals.

The private Land Claims appeals were *cases.* On the other hand, in a lengthy Opinion this Court, in *Gordon vs. U. S.,* 117 U. S. 697, held that:

> "And it is very clear that this Court * * * can not, under the Constitution, take jurisdiction of any decision, upon appeal, unless it was made by an inferior court, *exercising independently the judicial power* granted to the United States. It is only from such judicial decisions that appellate power is given to the Supreme Court."

The attempt to give this Court jurisdiction was in an amendment which in no wise altered the administrative proceeding theretofore set up. There is here, therefore, no more of a *case* than was before this Court in the *General Electric Company case.*

STATEMENT OF THE CASES.

This Court is asked to review decisions of the Court of Appeals of the District of Columbia on appeals from the decision of the Federal Radio Commission (R. 1130) granting application of the Johnson-Kennedy Radio Corporation (Station WJKS) of Gary, Indiana, for modification of its license (R. 1131), and terminating the existing radio broadcasting licenses heretofore issued to Nelson Brothers Bond & Mortgage Company (Station WIBO) and North Shore Church (Station WPCC), both of Chicago, Illinois.

On September 26, 1930, the Johnson-Kennedy Radio Corporation of Gary, Indiana (Station WJKS), filed with the Federal Radio Commission an application for modification of its then license (R. 35), and requested a regional frequency of 560-610 kc., power of 1 kw. night and 1,250 watts daytime, with unlimited hours of operation. The regional frequency 560 kc., and hours of operation were then assigned to Nelson Brothers Bond & Mortgage Company (Station WIBO), of Chicago, Illinois, and North Shore Church (Station WPCC) of Chicago, Illinois.

Applicant Johnson-Kennedy Radio Corporation (Station WJKS) at that time had assignment of frequency 1,360 kc. with power of 1 kw. night and 1,250 watts daytime and hours of operation shared with Station WGES of Chicago, Illinois.

The application of the Johnson-Kennedy Radio Corporation was for the purpose of removing Stations WIBO and WPCC from the air, and bestowing upon the Johnson-Kennedy Radio Corporation (Station WJKS), intervener herein, the assigned radio facilities of frequency channel and time theretofore granted to respondents. The applicant, in a telegram to the Federal Radio Commission amending its application stated (R. 39):

> "* * * the applicant desires stations WIBO and WPCC Chicago as the stations to be *removed.*"

Thereafter the Commission, on October 6, 1930, notified the respondents that the Commission had examined the application of the Johnson-Kennedy Radio Corporation, and, not being satisfied that public interest, convenience or necessity would be served by granting same, had designated the matter for hearing on April 23, 1931 (R. 43).

No proceeding was instituted to *revoke* the permits of stations WIBO and WPCC under the provisions of Section 9 of the Radio Act, which section is still in force.

Hearing was had on the application of WJKS, however, and consumed seven days, from April 23 to April 30, 1931, before Ellis A. Yost, the Commission's Chief Examiner. Said Chief Examiner thereafter, on July 28, 1931, filed with the Commission his report, wherein he reviewed the evidence, made findings and recommended as follows:

> "In consideration of the foregoing it is recommended that the application of Johnson-Ken-

nedy Radio Corporation for use of the 560 kc. channel now assigned to Stations WIBO and WPCC, be *denied*" (R. 1082).

Thereafter the applicant Johnson-Kennedy Radio Corporation, on August 14, 1931, by its counsel, Mabel Walker Willebrandt, filed exceptions to Examiner's report and requested oral argument in support of its exceptions (R. 1095), and thereafter, on October 16, 1931, without further notice to or hearing of appellants, the said Commission denied the request of the applicant for oral argument, granted the application of Johnson-Kennedy Radio Corporation for modification of its license, directed the Secretary of the Commission to issue a modified license to said Johnson-Kennedy Radio Corporation authorizing the operation of its station WJKS on the regional frequency of 560 kc. with power of 1 kw. night and 1,250 watts daytime and unlimited hours of operation, directed its Secretary to terminate the existing radio broadcasting license theretofore issued to Nelson Brothers Bond & Mortgage Company (Station WIBO) and North Shore Church (Station WPCC) in accordance with the conclusions reached in said decision and the terms and conditions of said licenses, and directed that the order be effective twenty days from the date thereof (R. 1130).

Respondents, on October 24, 1931, filed in the Court of Appeals their notices of appeal (R. 1, WIBO, and R. 17, WPCC) with statements of reasons therefor, and therewith their petitions for stay of the Commission's decision and order (R. 7, 24). Stay was granted October 31, 1931.

The Johnson-Kennedy Radio Corporation of Gary, Indiana (Station WJKS), the prime mover before the

Commission, intervened in these appeals (R. 9), as did Strawbridge & Clothier, Philadelphia, Pa. (Station WFI) (R. 12).

By stipulation (R. 34) it was agreed that a single record be filed for both appeals, the records being identical. Such record was filed November 16, 1931 (R. 1132).

In general, appellants' respective statements of reasons for appeal are similar. The facts differ in details, some of which will be referred to, but the action of the Federal Radio Commission as to each respondent raises the same questions of law.

Summary of Argument.

The findings of the Court of Appeals are supported by the record.

No steps were taken for a revocation of respondents' permits but the Commission proceeded on the premise that it had the power to "forfeit" licenses, on the mere application of a station in an under-quota State within a zone that such forfeiture be worked in order to bestow upon the applicant the facilities of the "deleted" stations. This false premise and the lack of any ground for revocation as well as the absence of any proceeding to revoke, made the action of the Commission arbitrary and capricious. The Commission was also arbitrary and capricious in that it did not apply its own orders to the case.

The Commission ignored the fact that while both Indiana and Illinois are under quota in regional stations, Indiana has more regional station assignments in proportion to its quota than has Illinois.

The Commission's order is contrary to the statute

in that it permits the applicant to designate a station to be deleted or "removed."

The forfeiture of stations which have been found by the Commission to be serving public interest, convenience and necessity would be an unreasonable execution of the mandate of Congress to apportion facilities "*equitably among the States,*" and an interpretation of the statute as giving such power would be unconstitutional.

The Court of Appeals of the District of Columbia, the final administrative supervisor of the acts of the Commission, has properly applied the law in its various decisions and has established principles of law which should be applied to this case.

Statutes Involved.

Section 9 of the Act of February 23, 1927 (44 Stat. 1169), provided:

> "The licensing authority, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.
>
> "In considering applications for licenses and renewals of licenses, when and in so far as there is a demand for the same, the licensing authority shall make a distribution of licenses, bands of frequency or wave lengths, periods of time for operation, and of power among the different States and communities as to give fair, efficient, and equitable radio service to each of the same."

This Act contained no provision for "deletion," or "forfeiture" of any station. It was amended by the

Act of March 28, 1928, known as the Davis Amendment (45 Stat. 373) and the ninth section as amended now reads as follows:

SEC. 9. The licensing authority, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

It is hereby declared that the people of all the zones established by Section 2 of this Act are entitled to equality of radio broadcasting service, both of transmission and of reception, and in order to provide said equality the licensing authority shall as nearly as possible make and maintain an equal allocation of broadcasting licenses, of bands of frequency or wave lengths, of periods of time for operation, and of station power, to each of said zones when and in so far as there are applications therefor; and shall make a fair and equitable allocation of licenses, wave lengths, time for operation, and station power to each of the States, the District of Columbia, the Territories and possessions of the United States within each zone, according to population. The licensing authority shall carry into effect the equality of broadcasting service hereinbefore directed, whenever necessary or proper, by granting or refusing licenses or renewals of licenses, by changing periods of time for operation, and by increasing or decreasing station power, when applications are made for licenses or renewals of licenses: *Provided*, That if and when there is a lack of applications from any zone for the proportionate share of licenses, wave lengths, time of operation, or station power to which such zone is entitled, the licensing authority may issue licenses for the balance of the proportion not applied for from any zone, to applicants

from other zones for a temporary period of ninety days each, and shall specifically designate that said apportionment is only for said temporary period. Allocations shall be charged to the State, District, Territory, or possession wherein the studio of the station is located and not where the transmitter is located.

No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses.

No renewal of an existing station license shall be granted more than thirty days prior to the expiration of the original license.

The power of the Federal Radio Commission to regulate, license, assign facilities and revoke, modify or suspend licenses, other than as shown above, is contained in Section 4 of the Act of February 23, 1927 (44 St. 1163), as follows:

SEC. 4. Except as otherwise provided in this Act, the commission from time to time, as public convenience, interest, or necessity requires, shall—

(*a*) Classify radio stations;

(*b*) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

(*c*) Assign bands of frequencies or wave lengths to the various classes of stations, and

assign frequencies or wave lengths for each individual station and determine the power which each station shall use and the time during which it may operate;

(*d*) Determine the location of classes of stations or individual stations;

(*e*) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;

(*f*) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however,* That changes in the wave lengths, authorized power, in the character of emitted signals, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, in the judgment of the commission, such changes will promote public convenience or interest or will serve public necessity or the provisions of this Act will be more fully complied with;

(*g*) Have authority to establish areas or zones to be served by any station;

(*h*) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

(*i*) Have authority to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable;

(*j*) Have authority to exclude from the requirements of any regulations in whole or in part any radio station upon railroad rolling stock, or to modify such regulations in its discretion;

(*k*) Have authority to hold hearings, summon

witnesses, administer oaths, compel the production of books, documents, and papers and to make such investigations as may be necessary in the performance of its duties. The commission may make such expenditures (including expenditures for rent and personal services at the seat of government and elsewhere, for law books, periodicals, and books of reference, and for printing and binding) as may be necessary for the execution of the functions vested in the commission and, as from time to time may be appropriated for by Congress. All expenditures of the commission shall be allowed and paid upon the presentation of itemized vouchers therefor approved by the chairman.

There is nowhere in the Radio Act or any amendment thereto any provision under which a "forfeiture" may be invoked.

General Orders of the Federal Radio Commission.

The General Orders of the Federal Radio Commission, explanations thereof as published by the Commission, and minutes of the Commission pertinent in this matter are as follows:

General Order No. 92 of June 17, 1930 (R. 1069 *et seq.*);

Explanation of General Order No. 92 and revised Quota Tables (R. 751 *et seq.*);

General Order No. 102 of January 8, 1931 (R. 1072);

Explanation of General Order No. 102, Feb. 26, 1931;

Minutes of the Federal Radio Commission, June 25, 1930 (R. 1075);

Announcement by the Commission, Aug. 19, 1930, of Bureau of Census "Preliminary Announcement of Population of the United States; 1930," as the basis

for computing the quota of radio facilities due each State under the Radio Act of 1927 as amended, and tables thereunder (R. 1075).

References to these Orders, explanations, etc., will be made according to the record, in order not to encumber this brief, but for convenience, General Order No. 102, and the explanation thereof, are set forth in the Appendix, p. 76.

THE THREE STATIONS.

Note: Hereafter in this brief the stations will be referred to by call letter designation as follows:

WIBO: Station owned by Respondent, Nelson Brothers Bond & Mortgage Company, Chicago, Illinois, operating on frequency of 560 kc., with power of 1500 watts daytime and 1 kw. night time, under license issued August 28, 1931 (R. 39-41).

WPCC: Station owned by Respondent, North Shore Church, Chicago, Illinois, sharing time with station WIBO on the same frequency with 500 watts power, under license issued August 25, 1931 (R. 41-43).

WJKS: Station owned by Petitioner, Johnson-Kennedy Radio Corporation of Gary, Indiana, operating on a frequency of 1360 kc., with power of 1250 watts daytime and 1 kw. night time, sharing time with Station WGES, Chicago.

Procedure Before the Federal Radio Commission.

WJKS applied, September 26, 1930 (R. 35) for modi-

fication of license, seeking, instead of the 1360 kc. frequency, a frequency of 560/610 kc., with unlimited time of operation. Thereafter, by telegram to the Federal Radio Commission dated February 16, 1931 (R. 39), WJKS amended its application, referring to General Order No. 102 issued January 8, preceding, and stating:

> "If under the provisions of General Order No. 102 the granting of this application would require the removal of a station or stations using the facilities requested in an over quota state of the fourth zone then the applicant desires station WIBO and WPCC Chicago as the stations to be *removed.*"

Notices were sent to respondents and others deemed by the Commission to be interested, designating the matter for hearing on April 23, 1931 (R. 43-44). (No proceedings were instituted to revoke the permits of WIBO and WPCC.)

Hearing was had before Ellis A. Yost, Chief Examiner, and voluminous testimony and exhibits assembled during seven trial days.

Thereafter, on July 28, 1931, Yost, Chief Examiner, presented his report No. 235 (R. 1082-1094) with conclusions, and with the recommendation that the application of WJKS for use of the channel assigned to Stations WIBO and WPCC be denied (R. 1094).

WJKS excepted to the examiner's report August 14, 1931 (R. 1095-1123) and moved for oral argument.

Thereafter, without notice to respondents or other parties, the Commission made a "Statement of Facts, Grounds for Decision and Order of the Commission," denying oral argument to WJKS, granting the appli-

cation of WJKS authorizing the operation of WJKS on the frequency of 560 kc., with 1 kw. power nights and 1250 watts daytime and unlimited hours of operation, and directing the termination of the existing broadcasting licenses of WIBO and WPCC, making its order effective twenty days from date of filing, to wit, October 16, 1931 (R. 1124-1131).

Hence the appeal to the Court of Appeals.

ARGUMENT.

The Findings of the Court Are Supported by the Record and the Action of the Commission Was Arbitrary and Capricious.

At the outset attention is called to statements in the brief of the petitioner, Johnson-Kennedy Radio Corporation (WJKS). Petitioner WJKS states that there were within fifty miles of Chicago forty stations. *Petitioner's station was one of them.* That station contributed to the over-quota condition surrounding Chicago in that zone. Petitioner calls attention to the preamble of the Davis Amendment, which states that the people of all the zones are entitled to equality of radio broadcasting service, *both of transmission and of reception.* It is a fact which is not disputed anywhere in the record that respondents' stations provide radio service to the population within the area of petitioner's station, who receive a large proportion of their broadcasting service from stations operating in Illinois (includng respondents' stations) *none of which service may be charged against the quota of Indiana.*

Petitioner's own contentions are contrary to these admissions, proven facts and conditions.

The record clearly bears out the finding of the Court (R. 1069 *et seq.*) that

> "In the reallocation of 1928 following the enactment of the Davis amendment (act of March 28, 1928, 45 Stat. 373), the Commission found that conditions warranted the assignment of the frequency of 560 kc. to Station WIBO (originally established in April, 1925) and Station WPCC (originally established in July, 1924), and the assignment of the frequency of 1,360 kc. to Station WJKS (originally established in August, 1927). The evidence fails to disclose that there has been a material change in conditions since the reallocation of 1928."

In dealing with the question, Petitioner WJKS states that "Reason repudiates such a passive interpretation of powers conferred" upon the Commission, and cites as authority for the Constitutional power of Congress to grant the right to "delete" or "forfeit" stations the case of *American Bond & Mortgage Co. vs. U. S.*, 52 F. (2d) 318. It should be noted that the Court in that case, which grew out of the reallocation under the Davis Amendment, said:

> "Whether Congress was acting within its power to regulate the broadcasting stations *by ordering certain stations off the air* presents, of course, a closer question, which can only be solved by an examination of the facts to ascertain the *reasonableness* of the Commission's order."
>
> "* * * Every investment in broadcasting stations was subject to the exercise of *reasonable* and necessary regulation by Congress."

Further than that *no* Court has dealt with the ques-

tion or decided that it is constitutional in any event to destroy an investment in a station which is serving public interest, convenience, and necessity, on the mere request by another station that there be a forfeiture to it.

The reference by petitioner WJKS to the case of *Colorado vs. U. S.*, 271 U. S. 153, only proves that any regulation by the Federal Government based on a Constitutional right to regulate, must be *reasonable.* The permission given by the Interstate Commerce Commission to a railroad to give up or abandon, on its own request, a part of its road, is not the destruction, by the regulatory authority of the Federal Government, on the request of another railroad company, of facilities which the owner wishes to operate. There is no comparison.

The Court did not base its reversal of the case on the summary of the examiner. The opinion shows that the Court found that the examiner had carefully reviewed the established facts. It found that the Commission made certain findings. The Court then states its own findings, all of which are fully borne out by the record. Nowhere is it "apparent" that the Court did not examine the entire record. On the contrary, finding that the examiner, who *saw* and *heard* the witnesses, had made a careful review of the established facts, the Court concluded that the Commission had acted arbitrarily and capriciously because the Court could find no reason for the Commission's act of "destroying" respondents' stations other than that Indiana was under quota. The Court must have made a careful examination of the record to be able to determine that "the conclusively established and admitted facts furnish no legal basis for the decision of the Commission."

One cannot read this record and conclude that the Court has not thoroughly examined it; nor can one read it and conclude that the Commission gave any consideration whatever to any fact except that Indiana was under quota and respondents' stations must be forfeited to provide the means for extending the kind of service already rendered by WJKS.

No Proceeding Was Instituted Under Section 9 of the Radio Act to Revoke the Licenses of Stations WIBO and WPCC, and the Decision of the Commission, Based on the Premise of Forfeiture, Was Arbitrary and Capricious.

In its decision, in the "Preliminary Statement and the Issues," The Commission said:

> "The issue in this case is, whether or not the public interest, convenience and/or necessity would be served by the granting of this application *and the consequent forfeiture* of the facilities now assigned to stations WIBO and WPCC."

As correctly found by the Court of Appeals, with respect to Station WIBO (R. 1140):

> "There is not even a suggestion that it has failed to comply in any respect with the regulations of the Commission; on the contrary it affirmatively appears that this station has been operated in the public interest."

Section 14 of the Radio Act (c. 169, 44 Stat. 1168), which has never been amended or repealed, reads, so far as pertinent here, as follows (italics ours):

> "Any station license shall be *revocable* by the Commission for false statements either in the application or in the statement of fact which may be required by Section 10 hereof, or because of conditions revealed by such statements of fact as may be required from time to time which would warrant the licensing authority in refusing to grant a license on an original application, or for failure to operate substantially as set forth in the license, for violation of or failure to observe any of the restrictions and conditions of this Act, or of any regulation of the licensing authority authorized by this Act * * *. Provided that no such order of revocation shall take effect until thirty days' notice in writing thereof, stating the cause for the proposed revocation, have been given to the parties known by the Commission to be interested in such license. * * *."

The so-called Davis Amendment, which amended Section 9 of the said Act, provided for the allocation of licenses. It did not alter the provisions of Section 14 or repeal that section. The Act contains no provision for "removing," "deleting," "forfeiting" or "destroying" licensed stations. There is, therefore, no statutory power for the forfeiture of a station; the Order of the Commission is not a "fair and equitable" allocation of licenses under the Davis Amendment; and this attempt to revoke licenses without proceeding in the manner and on the grounds laid down by the statute, by "forfeiting" them is, we submit, arbitrary and capricious, and without any warrant in law.

Owing to the inconsistency with which the Commission found certain facts as to the service of respondents' stations WIBO and WPCC and then concluded with findings that petitioner's station WJKS

was entitled to an assignment of facilities that would destroy two existing, long-established stations which were serving public interest, convenience and necessity, this Court will not review the voluminous record and make an independent investigation as to whether the Court of Appeals has erred in finding in the record the evidence introduced on behalf of respondents.

If this Court should consider and decide the question whether there was substantial testimony, and whether notwithstanding such substantial testimony, the action of the Radio Commission was arbitrary and capricious, this Court would, in effect, constitute itself an administrative body, to decide an administrative question, at the instance of an applicant who had no legal right to the facilities applied for because, in law, they cannot be forfeited, nor even revoked in the manner sought.

Under the Radio Act the court does not enter the order; it remands the case to the Commission to carry out the court's judgment, but it is the legislative discretion of the court that is carried out. The court must examine the entire record before it can determine whether the facts found by the Commission, even if supported by substantial evidence, make the findings, *i.e.*, the conclusions, of the Commission arbitrary and capricious. As stated in *Crowell vs. Benson*, 285 U. S. 22, this Court said:

> "The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumen-

talities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts and *finality as to facts becomes, in effect, finality in law.*"

In the instant case the Congress has given the Court of Appeals of the District of Columbia the jurisdiction to review not only questions of law, which must include questions where "finality as to facts becomes, in effect, finality in law," but jurisdiction to reverse the decision of the Commission where the "findings" (not findings of fact only) of the Commission are arbitrary and capricious.

The Court of Appeals decided (R. 1141):

> "The question, therefore, in this case is whether the decision of the commission assigning to the applicant station the frequency enenjoyed by Stations WIBO and WPCC since 1928 'and the subsequent forfeiture' of the assignment held by Stations WIBO and WPCC is a reasonable exercise of regulatory power or an arbitrary and capricious assertion of power.
>
> Station WIBO was established in April, 1925, and represents a total cost of about $346,000, less a reserve for depreciation of about $54,000. It employs 55 persons; has monthly operating expenses of from $16,000 to $18,000. It serves a radius of from 50 to 100 miles and, on the basis of its earnings, is estimated to be worth between $500,000 and $700,000. There is not even a suggestion that it has failed to comply in any respect with the regulations of the commission; on the contrary, it affirmatively ap-

pears that this station has been operated in the public interest.

Station WPCC was established in July, 1924, and is owned by the North Shore Church of Chicago. Prior to the installation of this broadcasting station, the church was largely in debt. The installation of the radio greatly increased the church's audiences. There are 20 radio stations in Chicago broadcasting about sixty hours of religious programs on Sundays, but there are practically no week-day spiritual programs broadcast except those of station WPCC. That the operation of this station has been in the public interest, clearly appears.

* * * * * *

We have repeatedly held that 'it would not be consistent with the legislative policy to equalize the comparative broadcasting facilities of the various states or zones by unnecessarily injuring stations already established which are rendering valuable services to their natural service areas.' Reading Broadcasting Co. vs. Fed. of Radio Comm., 60 App. D. C. 89, 48 F. (2d) 458; Chicago Fed. of Labor vs. Fed. Radio Comm., 59 App. D. C. 333, 41 F. (2d) 422.

* * * * * *

Station WIBO had been broadcasting for more than two years, and station WPCC more than three years, when station WJKS entered the field. The only apparent reason for granting the application of station WJKS and destroying the other two stations is that Indiana is underquota, which in the circumstances furnishes no substantial justification for the decision of the commission. As already observed, the evidence discloses that stations WIBO and WPCC have been and are 'serving public interest, convenience, and necessity' certainly to as great an extent as the applicant station. In our view, the conclusively established and admitted facts furnish no legal basis for the decision of

the commission. In other words, the decision is in a legal sense arbitrary and capricious."

THE FACTS.

The facts pertaining to the engineering and technical aspects of the case are dealt with in the Appendix, page 79, and the facts relating to the public interest, convenience and necessity served by the stations at page 87.

History and Financial Positions of the Stations.

WIBO has been in continuous operation since April 14, 1925 (R. 405), and by action of the Federal Radio Commission on November 27, 1928, with Station WISJ and Station WPCC, was assigned the 560 kc. frequency.

The station represents a total cost of $346,362.99, with a reserve for depreciation of $54,627.36 (R. 419-420). It earned, during the month of March, 1931, between $9,000 and $10,000 (R. 401). It employs 55 persons (R. 401) and has monthly operating expenses of from $16,000 to $18,000 (R. 402). The owner has a credit rating of $300,000 (R. 401). See also Examiner's findings (R. 1091) and the Commission's findings (R. 1128) confirming these facts, and balance sheet of the Nelson Brothers Bond & Mortgage Company (R. 1034).

On page 36 of the Brief of WJKS is the statement that

> "The court below attached great importance to the view of the examiner (as to the financial ability of station WIBO)," etc.

It should be noted that all that is said with regard to emphasis placed by the court "on the total cost of about $346,362.99" is moot, as the Commission itself found that the total cost of the station was $346,362.99 (R. 1128). Apparently it is only where the Commission overrules the examiner that the Commission is right. The statement that this is not a destruction of property in violation of the constitutional right to compensation is not borne out by the cases cited. It is not only a destruction of property but is not due process of law. It is immaterial whether the value be $346,000 or $1.

Station WPCC was established in July, 1924 (R. 145), and is owned by the North Shore Church of Chicago (R. 137). The church has been offered $800,000 for the church property (R. 142) and is the owner of a valuable radio transmission station. The installation of the radio has trebled the church's audience, its budget has increased from two to threefold the amount prior to the use of the radio; charitable disbursements for Thanksgiving and Christmas, 1931, were, respectively, $2200.00 and $2500.00, with maintenance of 34 families, distribution of tens of thousands of garments, payments of doctors' bills, employment of a nursing missionary, feeding of unemployed and other charities (R. 139). The church has adequate funds at all times to maintain the radio station, with a fund of $10,000 set aside toward the construction of a new station (R. 142).

Station WJKS commenced to broadcast after the granting of a license following a hearing in August, 1927, using a frequency of 1290 kc. with power of 500 watts and sharing time with Station WSBC of Chicago. Upon the reallocation in 1928, *i.e.*, the realloca-

tion based upon the Davis Amendment, the station was assigned to the 1360 kc. channel on four-seventh time, sharing the channel with station WGES, Chicago. After a complaint to the Commission of interference it was assigned 1250 watts daytime and 1 kw. night time power (R. 63). The station is owned by Johnson-Kennedy Radio Corporation, having a paid-up capital stock of $30,000, of which $20,000 is common stock and $10,000 is preferred (R. 80). Recently Ralph Atlas purchased one-half of the capital stock for $15,000. Thomas J. Johnson, president of the company, testified that he and his wife had put into the corporation from $50,000 to $60,000. The company had never declared a dividend and had not been run strictly as a corporation (R. 96). Both the Examiner and the Commission found that WJKS had a paid up capital stock of $30,000, of which Johnson, the president, and his wife owned 50 per cent and Atlas, the treasurer, the other 50 per cent. The Examiner found that Johnson estimated the value of the station to be between $75,000 and $100,000, but mentioned the sale of 50 per cent of the stock to Atlas for $15,000. The Commission found that the station rates an investment of approximately $75,000 (For the Examiner's findings, see R. 1083; for the Commission's findings, R. 1125). The company had $10,000 in the treasury (R. 96). WJKS was interested in charities and during the Christmas season of 1930 conducted a drive. The president of the company testified that the "money was very, very small,—probably a couple of hundred dollars" (R. 86), but they collected thousands of garments and considerable food.

During the pendency of this case and in another matter both Station WIBO and Station WPCC were found

by the Examiner to be serving public interest, convenience and necessity on their present assigned frequency of 560 kc. and sharing time with each other. (See Examiner's report, R. 1091.)

The Commission ignored the facts that, while both Indiana and Illinois are under quota in regional stations, Indiana has more regional station assignments in proportion to its quota than has Illinois.

The primary provision of law in this field is Section 9 of the Act of February 23, 1927, to the effect that the licensing authority, if public convenience, interest or necessity will be served thereby, shall grant to any applicant a station license, and requiring that in considering applications for licenses and renewals, "when and in so far as there is a demand for the same," it shall make such distribution of licenses, bands of frequency or wave lengths, periods of time for operation and power among the different states and communities, as to give "fair, efficient and equitable radio service to each of the same" (*i. e.*, licensees). This Act resulted in numerous stations, confusion of service, and the so-called chaotic condition which brought about the Davis Amendment in the Act of March 28, 1928.

The three principal stations involved herein, WJKS, WIBO and WPCC, were licensed in the light of the Davis Amendment on the reallocation which followed that Act in November, 1928. Nothing has occurred since that time to alter the facts then existing presently adduced before Chief Examiner Yost at the hearing herein which resulted in his report recommending the denial of the application of WJKS, Gary, Indiana, for the wave band and total hours used by WIBO and WPCC in Chicago, Illinois.

The Davis Amendment declares that the people of all the zones are entitled to ~~equity~~ equality of radio broadcasting service, both of transmission and of reception; that the licensing authority shall, as nearly as possible, make and maintain an equal allocation of broadcasting licenses, of bands of frequency or wave lengths, of periods of time for operation and of station power to each of the zones, when and in so far as there are applications therefor, and shall make a fair and equitable allocation of licenses, wave lengths, time for operation, and station power to each of the States, the District of Columbia and possessions of the United States within each zone, according to population. This the licensing authority shall carry into effect, whenever necessary or proper, by granting or refusing licenses or renewals of licenses, by changing periods of time for operation, and by increasing or decreasing station power when applications are made for licenses or renewals of licenses. This constitutes the principal command of the statute in regard to the allocation.

By its General Order No. 92 of June 17, 1930 (R. 1069) the Federal Radio Commission undertook to erect a unit basis by which stations would be classified and unit values be given thereto, and thus by a division of the unit values in the zones, states, District of Columbia and territories, equality of service could be assigned, proportioned per zone and subdivisions thereof.

General Order No. 92 concluded with the statement that:

> "The quota of broadcasting facilities to which each state is entitled shall be determined and fixed as herein provided and in accordance with

> values in units for various classes of stations above set out."

In the "Explanation of General Order No. 92 and the Revised Quota Tables," July 2, 1930, the Commission undertook to explain the principles adopted in the General Order, set forth tables showing the details of the quota units by zones and States (R. 751) and found certain states "over quota" and certain states "under quota," and concluded with this statement (R. 757):

> "As pointed out, the distribution of radio facilities can never be exactly proportional, but it is evident that conditions will be gradually improved as some stations which are financially unsound 'go off the air' and other assignments are transferred from 'over quota' to 'under quota' areas."

Thereafter, General Order No. 102 (R. 1072), of January 8, 1931, was promulgated. That order recited that the first and second zones were under quota and the remaining three zones over quota; that a number of states were over quota, and a number of states under quota, and that applications from under quota states were pending; ruled (1) that no further allocations would be made to over quota zones which would increase quota; (2) that applications from under quota states in zones which have already allocated to them their pro rata share of facilities should be for a facility already in use in that zone by an over quota state; (3) that no further facilities should be given to an "over quota" state; (4) that applications from "over quota" states should be for facilities already in use in that state; and (5) that an application from an

under quota state in an under quota zone should be either for facilities in an over quota state within that zone or an over quota state in an over quota zone.

The order then provides that since the Commission has classified stations according to power into clear channel, regional and local stations, and has allocated frequencies for the use of each of the classes, applications should be for the frequencies set aside by the Commission for the character of station applied for. We assert that the Commission's own order thus recognized that quota was subdivided according to station class to zones and states.

It was under this General Order that WJKS, having applied on September 26, 1930, for a frequency of 560 to 610 kc. instead of its existing 1360 kc. and unlimited time of operation, amended its application, by telegram of February 16, 1931, claiming the original frequency of WIBO and WPCC of Chicago as the stations which WJKS sought to deprive of their frequency and time.

We point out that while, according to the testimony of A. D. Ring, Federal Radio Commission Engineer, Illinois, in the Fourth Zone, is over quota in total radio facilities by 40 per cent, or 11.15 units, it is under quota in regional station facilities by approximately 60 per cent, or 4.36 units. Indiana is under quota in total radio facilities by approximately 20 per cent, but is under quota in regional facilities by only 18 per cent or 0.57 units. The assignment of station WJKS on the 560 kc. frequency and the deletion of WIBO and WPCC therefrom would decrease the present low Illinois regional assignments so that it would be approximately 72 per cent under quota in regional stations; and would increase the Indiana quota to within 4.5

per cent of the regional station quota due it. (See Examiner's Report R. 1087-1088 and testimony of Ring, R. 107-108, 113, 122, and consult quota table page 86 under heading "*Technical Facts.*")

We assert that the Commission, assuming its power to delete existing and otherwise good stations in aid of quota adjustments, has departed from the principle set forth in its classification of stations under General Order No. 92, and by ordering the deletion of regional stations in Illinois in favor of an Indiana station to which the frequency is transferred, has violated the command of Congress by increasing the under-quota condition of Illinois in favor of the already superior condition of Indiana with respect to regional stations.

Following the general reallocation of 1928, Indiana was in a superior position with respect to regional stations as against Illinois. The Commission's present order, by increasing the disparity in favor of Indiana, violates the principle and countervenes the command of Congress found in the Davis Amendment.

The Commission's order is contrary to the statute in that, by virtue of its own order No. 102, the Commission has not exercised its own discretion in deletion of stations and transfer of facilities, but has foreclosed itself to exercise discretion, by permitting the applicant station in Indiana to select the station or stations and the facilities thereof, in Illinois, which it would remove from Illinois to its own possession and use in Indiana.

The Davis Amendment contemplates equitability of radio facilities according to population, and invests the Federal Radio Commission with the establishment thereof within the terms of the law. This the Com-

mission, by this decision, and acting under its General Order No. 102, undertakes to accomplish by authorizing an applicant in a gross under quota state to apply for a facility in use by a station in a gross over quota state. In one of its grounds for decision (Ground No. 5, R. 1130) the Commission bases its action primarily on increasing facilities in Indiana and decreasing facilities in Illinois. It is submitted that by limiting its action, under General Order No. 102, to the facilities selected by an under quota state applicant, the Commission, *pro tanto*, abandons its exercise of discretion and places such discretion with the applicant for the facilities; and that it is the primary action of the applicant station, in naming the facility which it wishes to secure, such as occurred in this case, that controls or limits the decision of the Commission. To this extent the Commission surrenders to a large and fundamental extent its power to allocate facilities for the public interest, convenience and necessity and places not only the power to allocate, but the power to delete stations in the hands of an applicant. The transactions in this case are illustrative of the evil thus engrafted upon the law and the procedure thereunder.

WJKS applied for another frequency and full time, mentioning instead of its existing band of 1360 kc. a frequency within the 560/610 bands. Following General Order No. 102, the applicant, by telegraph, stated that it desired WIBO and WPCC, Chicago, as the "stations to be removed." In its final disposition of the case the Commission found itself bound, if it acted favorably on the application of WJKS, to act within the limits of this selection by WJKS and without consideration of the general field of radio broadcasting in the several states of the Fourth Zone, or of other zones

and states, districts and territories, within the United States, and without consideration of the comparative effect upon public interest, convenience and necessity of the destruction of established stations found, even pending consideration of this case, to be serving public interest, convenience and necessity.

It is submitted that the Davis Amendment, even if authorizing deletion of otherwise well established and properly operating stations solely for the purpose of equalization, does not contemplate any process of transfer of facilities from one state to another, or from one zone to another, by mere selection by an applicant of the station or stations to be deleted. Assuming this power and sanction, such action can be taken by the public authority vested by Congress therewith, only on a survey aimed at accomplishing deletion, transfer and investing of the facilities in the general public interest, convenience and necessity.

Stations threatened with deletion are in justice entitled to examination in company with other stations in like posture and jeopardy; and to public ascertainment, on hearing and consideration, of respective utility in the public interest, convenience and necessity, prior to final order of deletion and surrender of facilities to an under quota state or zone applicant.

Such survey was made in the general reallocation of 1928. Independent and neutral consideration should, all other questions of law aside, be undertaken by the Federal Radio Commission prior to transfer of facilities, especially where such action involves deletion of stations long established and representing large investments. To tolerate the mere suggestion of facilities to be transferred and stations to be deleted, at the motion of the interested applicant alone, and to permit

the Federal Radio Commission to find itself bound within such limit as controlling its action under the Davis Amendment, is to subject stations in those zones or states which have been heretofore allowed to become over quota, to the mere wish and whim of individual applicants in under quota areas, the under quota condition of which is no wise attributable to the stations named by a hostile applicant for deletion.

The action of the Commission in entertaining the application in this case, as amended by telegram following the promulgation of General Order No. 102, constituted arbitrary and capricious action, in that it permitted the applicant to select the facilities of and name the stations to be deleted, in its own interest, and gave no consideration whatever to other stations in Illinois, or elsewhere, the facilities of which might meet applicant's asserted requirements and the transfers of which might meet the public interest, convenience and necessity more appropriately under the Davis Amendment than those automatically to be taken or in the language of the Commission as to the issue in this case (R. 1125), "forfeited" by WIBO and WPCC.

In other words, the naked action of the applicant, in naming the station or stations of which applicant desires to strip the facilities, forecloses the Commission, according to its action in this case, from giving general consideration to the field and from making that "fair and equitable allocation of licenses, wave lengths, time of operation and station power," which is the primary command of the Davis Amendment as to states within a zone.

Contrast of the services rendered by the stations involved and technical character thereof.

An examination of the evidence, the synopsis thereof in this brief and the findings, both of the Chief Examiner *and the Commission,* discloses that WJKS has been purely a local and neighborhood station, confining its chief activities to the City of Gary, Indiana, and claiming to serve the Calumet region.

The proprietor, Johnson (R. 90), in answer to a question by Chief Examiner Yost, stated that the same character of program would be employed in full time operation, for the greater accommodation of the people, the primary purpose of the application being to secure full time (R. 67); although he stated, in response to a question by the Chief Examiner as to what was wrong with the present assignment, that they encountered interference. None the less, no application for change in assignment had been made prior to the application here involved, since the general reallocation of 1928.

It is noticeable that no application has been made in the interest of full time for WJKS with respect to Station WGES, Chicago, which shares time with WJKS on the 1360 kc. channel (R. 63). As a practical matter, the good service found to have been furnished by WJKS continued for approximately three years on its present assignment of 1360 kc.

Asserting that it served the steel mill population and wished to maintain 24-hour service in view of the three-shift operation of the steel mills in Gary and the Calumet area, the representatives of the station none the less admitted that it has failed to broadcast on its present partial time for from two to three hours in

the morning, and uses from two to three hours per day in broadcasting records; this in the face of assertions that the additional time demanded through deletion of WIBO and WPCC is necessary in order that WJKS might increase accommodations to the Gary neighborhood, by broadcasting school children's recitals, school band concerts, information for steel workers, and, as stated by the Witness Johnson, for mere extension of the existing character of programs.

It is submitted that WJKS can not fairly be heard to demand additional time at the cost of deletion of two valuable stations in Chicago and the "consequent forfeiture" of the latter's facilities, when in fact, by the admission of its own representatives, WJKS now abandons part of the time already assigned to it and employs from two to three hours of the rest of the time each day in broadcasting phonograph records.

Furthermore, denying that it was a commercial station and asserting that it was maintained only in the interest of the community, the representatives of Station WJKS admitted that they made constant "spot announcements," for hire, at approximately five-minute intervals during the broadcasting, which announcements, as stated by the station program director, "disrupted" their programs, to say nothing of fifteen-minute interval announcements, during the season, of the Gay Mill Ball Room, owned by the Johnson family, from which the broadcasts emanate.

With sixty or more foreign languages spoken in Gary and the Calumet District, and ten of said languages being broadcast regularly, the station can serve only a small part of the population understanding such languages at any given time of a foreign language broadcast. None the less, except for alleged lack of time,

and alleged interference on the 1360 kc. channel, representatives of the station asserted that it had been successful, had served the community well and was otherwise satisfactory.

We assert that since the existing assignment of time has not been completely used by the station, or has been used for purposes other than those for which additional time is sought, the station can continue to maintain its present usefulness in broadcasting for the community it undertakes to serve, on its present assignment; and that so far as alleged interference now encountered on the 1360 kc. channel is concerned, no evidence has been adduced that it encounters more interference than is inevitable on a regional channel; nor is there any evidence that less interference would be encountered on the 560 kc. channel. On the contrary the evidence tends to suggest, as found by the Chief Examiner, that its nearest sharer of the 560 kc. channel would be in closer proximity on the 560 kc. channel than its present nearest sharer on the 1360 frequency.

All the evidence in the case indicated the high quality of the programs furnished on the commercial Station WIBO; and the clear evidence was that Station WPCC furnished spiritual broadcasts and engaged in religious and charitable work of great value. The latter station is the only station in Chicago broadcasting weekday evening religious programs. As to quality of service and competent employment of their broadcasting facilities for the public convenience, interest and necessity, both WIBO and WPCC have had the approval, after hearing and within the period of this controversy, in other proceedings, by Chief Examiner Yost, and no question of any kind has been raised as to the quality, propriety or excellence of the broadcasts of these two stations in their respective fields.

No assertion can be made, based upon the record, that WIBO programs are duplicates of programs of other stations in Chicago unless all evidence is discarded as to its relationship with the Chicago Evening American, the Publix-Balliban & Katz Theatres, its use of National Broadcasting Company's programs not otherwise available to the Chicago area, the popularity of the station through its broadcasts of sports, aviation and other programs of entertainment, educational, religious and diverse feature character and its relationship to television development through its associated television station. Nor can the suggestion indulged by the Commission, that the Moody Bible Institute station, WMBI, furnishes programs similar to those of WPCC, be established from the record. On the contrary, WMBI broadcasts only during the daylight hours. WPCC furnishes four weekday evening broadcasts per week and engages in activities, through its radio station, not duplicated in the entire area, to say nothing of its sustenance of missionaries in the field.

Any just examination of the evidence will disclose careless and slipshod management of Station WJKS, as contrasted with the skillful and attentive operation of the two Chicago stations ordered to be destroyed by the Commission's decision.

WIBO's technical character and operation are unquestioned. The same may be said of WPCC. WPCC, in its arrangement with WIBO, broadcasts its weekday programs over the WIBO transmitter. The latter is located at Des Plaines, some 25 miles northwest of the Chicago Loop, entirely outside the congested area, and is capable of and is operated at maximum efficiency.

As against these facts respecting WIBO and WPCC,

the applicant station, WJKS, introduced no substantial technical evidence as to the efficiency of its apparatus; and its engineering evidence, introduced by one witness, Falknor, in relationship to interference, failed to show proper engineering evidence thereof, or any such technical examination of the transmitting station at the Gay Mill Ball Room, Gary, as would establish that the applicant station either had efficient equipment or operated the same to secure the full value of the facilities which it now enjoys in power output, or had exerted itself to overcome technically the interference it complained of.

As to public interest, convenience, or necessity, attention is called to the fact, as shown by the exhibits (R. 910 *et seq.*), that the people of the area served by WIBO, including the Calumet District, have for a period of years learned to know WIBO as using the 560 kc. channel, at the "Top of the Dial." The expropriation of this frequency channel, under this application, would, therefore, bestow upon the applicant not only the facilities of Stations WIBO and WPCC, but also the good will, not only in the Gary and Calumet area, but in the Chicago area itself, created by WIBO in its education of the people of the region to the use of this channel and this place on the dial for radio service. That is, the people accustomed to the service of WIBO on this frequency, and of WPCC thereon, would find the programs to which they have been accustomed substituted by such service as WJKS has furnished and states it proposes to continue to furnish if allotted appellants' facilities. In other words, the entertaining, religious and other general service programs of WIBO and WPCC would be taken off the air and replaced on the 560 frequency by such programs

as would be furnished for entertainment and amusement to their own community by the neighborhood broadcasters, including foreign language speakers, for whom the representatives of WJKS assert the Gary station is largely maintained. To state the proposition in still other words, the 560 kc. frequency would be withdrawn from stations maintaining diversified programs for the listeners' benefit and enjoyment and bestowed upon a station allegedly maintained for the benefit of amateur broadcasters, rather than for the listening public, within the region.

Geographical Element Involved.

Applicant grounded its claim, under General Order 102, on the alleged gross underquota condition of Indiana, as against Illinois, and asks for the forfeiture of the regional frequency in Chicago assigned to WIBO and WPCC, despite the fact that Indiana is superior, in regional assignments, to Illinois. It wishes to employ the facilities, however, at Gary, Indiana, on the northern lake boundary of Indiana and twenty miles from the Illinois line (See R. 86). So far as reception is concerned, Northwestern Indiana enjoys all of the regional and cleared channel services operated in the Chicago metropolitan area. No benefit comes to Indiana by the allocation of present Illinois broadcasting facilities at the extreme northwestern corner of the State of Indiana, the population of which is able to receive all of the broadcasts made in the Chicago district as well as the present service furnished by WJKS at Gary; no benefit accrues to the State of Indiana through the transfer of the WIBO and WPCC facilities from Chicago to Station WJKS;

and no public convenience, interest, or necessity is promoted, either for the State of Indiana or the Fourth Zone, by the arbitrary transfer of the facilities to Gary and the deletion of the two Chicago stations.

On the contrary, the service to the listeners of the Chicago metropolitan district and the northwestern part of Indiana is deprived of the services of two stations deleted without substitution therefor of anything to the benefit of Indiana as a whole.

The decision of the Commission presents merely an arbitrary and capricious action, ungrounded in law or fact, as furnishing improvement for the public convenience, interest, or necessity, either to Northwestern Indiana or Indiana as a whole; but, in accomplishing such result, stations of long duration, great capital investment, and established good will with the listening public of the entire area in both Indiana and Illinois are to be deleted from the air and their properties destroyed.

The Commission acted capriciously and arbitrarily in overruling the recommendation of its Chief Examiner, and in reversing his findings on exceptions by WJKS without hearing the other parties affected.

The Chief Examiner's report in this case (R. 1082) included a review of the substantial evidence and the technical features involved, and referred to the rule announced by the Court of Appeals in *Chicago Federation of Labor (Station WCFL) vs. Federal Radio Commissioner,* 59 App. D. C. 333, quoting therefrom as follows:

> "It is not consistent with true public convenience, interest, or necessity that meritorious

stations * * * should be deprived of broadcasting privileges when once granted to them which they have at great cost prepared themselves to exercise, unless clear and sound reasons of public policy demand such action. The cause of independent broadcasting in general would be seriously endangered and public interests correspondingly prejudiced if the licenses of established stations should arbitrarily be withdrawn from them and appropriated to the use of other stations."

The Chief Examiner then concluded (R. 1093):

"1. The burden is upon the applicant seeking the frequency assigned another station, to prove by a preponderance of the evidence that public interest, convenience and/or necessity would be served by assigning applicant the frequency sought.

2. The applicant failed to prove that less objectionable interference would result from the operation of Station WJKS at Gary on the 560 kc. channel than now results from the operation of this station at Gary on its present assigned frequency of 1360 kc.

3. General Order No. 116, requiring all radio broadcasting stations operating between 550 kc. and 1500 kc. to maintain their assigned frequencies within the limits of 50 cycles above and 50 cycles below such frequencies, should, when in effect, reduce the interference now occurring within the service area of Station WJKS and as a consequence improve the service of this station.

4. Applicant station, WJKS, is rendering a commendable public service on its present part time assignment on the 1360 kc. channel. However, the service of Station WJKS would be improved by the installation of the most modern

radio equipment and the operation of this station in the most efficient manner on its present frequency.

5. It is possible more objectionable interference would result from the operation of Station WJKS on the 560 kc. channel than now results from the operation of this station at Gary on the 1360 kc. channel, since Station WNOX at Knoxville, Tenn., is separated from Gary by a distance of only 440 miles, whereas the nearest station on applicant's present assigned frequency, operating with 1 kw., is at Syracuse, N. Y., separated from Gary by a distance of 600 miles.

6. Stations WIBO and WPCC are meritorious stations, serving public interest, convenience and necessity. The owners and operators of these stations have at great cost prepared themselves to exercise the broadcasting privileges heretofore granted them by the Federal Radio Commission, and in the opinion of the Examiner, clear and sound reasons of public policy demand that these broadcasting privileges be not taken from them and assigned to applicant station.

7. Stations WIBO and WPCC provide radio service for the people within the service area of applicant station.

8. The people of Gary and the Calumet Region receive a large proportion of their radio broadcasting service from stations operating in the State of Illinois, none of which service may be charged against the quota of the State of Indiana.

9. In the opinion of the Examiner, there is nothing in the Radio Act of 1927, the Davis Amendment thereto, or the Commission's General Order No. 102, to justify the granting of this application, involving as it does the practical destruction of Stations WIBO and WPCC, erected, as they have been at great cost, operating by authority of the Federal Radio Commis-

> sion, and now serving public interest, convenience and necessity. Moreover, the applicant failed to prove to the satisfaction of the Examiner that the granting of this application would serve public interest, convenience and necessity."

All of the findings of the Examiner were buttressed by the evidence taken before him over a period of 7 days' hearings, and the Examiner recommended denial of the application (R. 1094).

Thereafter, on August 14, 1931, at great length, the applicant (R. 1095-1124) excepted to the Chief Examiner's report and prayed for oral argument in support of the exceptions.

Without notice to respondents WIBO and WPCC, or other parties interested, and without setting of the exceptions for oral argument, the Commission, October 16, 1931, entered a "Statement of Facts, Grounds for Decision and Order of the Commission" (R. 1124).

In its "Preliminary Statement and the Issues," the Commission concluded with the following (R. 1125):

> "The issue in this case is, whether or not the public interest, convenience and/or necessity would be served by the granting of this application and the consequent forfeiture of the facilities now assigned Stations WIBO and WPCC."

The "Statement of Facts" made by the Commission (R. 1125-1130), in contrast with the Chief Examiner's findings and with the record at large, indicates absence of any complete survey of the evidence or of examination of the technical facts pertaining to the operation of Station WJKS on the 1360 kc. channel or of the probable consequence of its attempted operation on 560

kc. or attempt to employ the legal principles applicable to the situation as announced by this Court in the *Chicago Federation of Labor* case, *supra*. Particularly no reference was made or apparent consideration given to the regional station assignments of Indiana and Illinois in relationship to their quota in that regard, as discussed under the preceding heading in this brief.

As to the exceptions filed by the applicant, the Commission said (R. 1130):

> "With many of the applicant's exceptions, and the objections to certain findings of the Examiner contained therein, the Commission is in agreement. With much of the matter recited in said exceptions, the Commission is not in accord."

No effort as made by the Commission to indicate what particular exceptions were sustained or denied.

The "Grounds for Decision" (R. 1130) are empirical, not consonant with the testimony and evidence, or with the Chief Examiner's findings drawn therefrom, and in ground No. 5 the Commission ignores the different classes of radio stations and the outstanding fact that Indiana is superior in assignments of regional stations, as against Illinois.

Contrasted with the evidence at large on the record and with the conclusions therefrom by the Chief Examiner, who heard the evidence, the "Statement of Facts" can not be said, as required by the law, to be supported by substantial evidence, and the findings of the Commission appear to be capricious and arbitrary.

In the face of testimony, by experts, that the substitution of the 560 kc. channel in place of the present 1360 kc. channel assigned to WJKS would be of uncer-

tain result, and the conclusion of the Chief Examiner (No. 5, R. 1093), that more objectionable interference would possibly result through the shortening of the distance between WJKS and Station WNOX, Knoxville, Tenn., the nearest station on the 560 kc. channel, as against the distance between WJKS and Syracuse, N. Y., 600 miles away, on its present 1360 kc. channel, the Commission none the less concluded, in its ground for decision No. 4, as follows:

> "The granting of this application and deletion of Stations WIBO and WPCC would not increase interference within the good service areas of any other stations."

This conclusion was not supported by evidence and can be treated only as an arbitrary and capricious finding, unsupported by substantial evidence.

It is asserted that:

1. The findings of fact made by the Commission are unsupported by substantial evidence; and

2. The findings of the Commission are, on their face, arbitrary and capricious.

It is further asserted that the action of the Commission in entertaining the exceptions, agreeing therewith in part and disagreeing therewith in part, and proceeding to judgment without notice or hearing to appellants, demonstrate caprice and arbitrariness on the part of the Commission.

Petitioner WJKS contends that the Commission did not err in disregarding the alleged cost of WIBO. The Court found, however, as did the Commission, that the cost of the station was $340,000. It makes no difference what the amount is, if the destruction is contrary to law, and all the argument regarding the

financial responsibility is of no avail in the face of the finding by the Commission.

Petitioner WJKS quotes many definitions of the word "arbitrary." All of them prove that the Federal Radio Commission in this case acted only according to its own will and arbitrarily. It willed to destroy the two stations, as its opening statement shows, and it did so, without any reason.

WJKS in its argument that the Commission did not act capriciously quotes definitions of the word "caprice." It is shown to mean "apt to change suddenly." The Commission did "change suddenly" after ordering stations WIBO and WPCC forfeited, when it "increased" the facilities in use in Chicago in the case of WCFL.

The cases cited as sustaining the dissenting opinion of the two justices who dissented deal with matters arising under the Interstate Commerce clause of the Constitution. We have referred above to the case of *Colorado vs. U. S.* In that case there was nothing taken from the railroad company.

In *Atlantic Coast Line vs. Goldsboro,* 232 U. S. 548, 558-9, it was held that the police power to protect users of the street could reasonably curb the use of the street by the railroad; but in that case there was not the taking of the facilities of the railroad by another railroad because compliance with law and successful operation of the road made it advantageous to an applicant to secure its forfeiture for applicant's benefit. The rule there laid down was that police power could not be bargained away, and contract and property rights are subject to *fair* exercise. Drainage, safety, health, and not destruction: reasonably necessary, not arbitrary, regulations are held to be valid.

In *Greenleaf-Johnson Lumber Co. vs. Garrison,* 237 U. S. 251, which is referred to in the dissenting opinion, there was a removal of an obstruction for public benefit, and not a taking of the property and an assignment of it, for the same purpose, to another in the same business. It might as well be argued that under its power to regulate Commerce Congress could authorize a regulation as to how many trains can run on a certain road and that Indiana corporations could take over the franchises to run trains coming in from Illinois. In short, all depends upon *reasonableness,* and upon necessity. It is believed that there is no necessity on the part of the public which requires that it be served with the broadcasting programs of station WJKS. In time of war or other emergency the interests of the Government, being the interests of the public, may dictate what broadcasting must be stopped by whatever broadcasting station such stoppage may be required in the interest of the public; but furnishing programs paid by a sponsor gives no reason for providing the one who desires to furnish additional programs with the facilities of the station he most desires to obtain. This is not a necessity.

THE LAW.

This Court has not decided the principle of law here involved. It has denied writs of *certiorari* on the ground that it has no jurisdiction to review so-called appeals from the Court of Appeals of the District of Columbia acting in a supervisory capacity over the Federal Radio Commission and it has refused to review cases on certificate from the Court of Appeals of the Seventh Circuit.

It is submitted that the decisions of the Court of Appeals of the District of Columbia have established the sound principles of law that statutes regulating broadcasting facilities must be interpreted to mean a reasonable regulation.

The Court of Appeals has reviewed many cases on appeal from the Federal Radio Commission's decisions under its jurisdiction created by Section 16 of the Federal Radio Act as amended.

In the case of *Reading Broadcasting Company vs. Federal Radio Commission*, 60 D. C. App. — (48 Fed. (2d) 459), on hearing by the Commission it was shown that improvement in transmission would aid the service of the station without change of frequency or power, while a change in the facilities would result in interference with two other stations. The Court found that the findings of the Commission were sustained by the evidence. The Commission had also found that public interest, convenience and necessity would not be served by awarding a frequency which would cause interference. The Court said:

> "We concur in these views, for it would not be consistent with the legislative policy to equalize the comparative broadcasting facilities of the various states or zones by *unnecessarily injuring stations already established* which are rendering valuable services to their natural service areas. The paramount consideration after all is the public interest, convenience and necessity and we are convinced upon a review of the record that the Board's conclusions are in line therewith." (Italics ours.)

Applying this authority to the case at bar, we submit that the elements present in the Reading Broad-

casting Company case are pointedly applicable here. The deletion of WIBO and WPCC would injure, actually destroy, stations already established and rendering valuable service in their natural service areas, to wit, the metropolitan district of Chicago and Northwestern Indiana. It must be kept in mind that WJKS, while complaining of interference on 1,360 kc., seeks principally additional time, but demands the 560 frequency, with possibly greater interference on that channel than on its existing channel. WJKS seeks but 3/7 additional time at the expense of the entire time of the two important stations to be destroyed, and without consideration of other possible sources of acquiring such time.

In *Chicago Federation of Labor vs. Federal Radio Commission,* 59 App. D. C. 333, the appellant (Station WCFL) sought modification of its license from its regional channel assignment to a cleared channel in the Fourth Zone, shared by WBBM, Chicago, and KFAB, Lincoln, Nebraska. The Federal Radio Commission denied the application. The Court said:

> "It is manifest that if the frequency in controversy, to wit, 770 kc., be granted to station WCFL for full time operation as contended for by that station, it means that stations WBBM and KFAB shall be denied the use of the frequency which they have hitherto enjoyed, without being given any substitute therefor in this proceeding. In the present overcrowded condition of the broadcast band, and in view of the fact that the Fourth Zone already enjoys more than its proportionate share of the cleared channels, the result would be that these two stations would be deprived of the broadcasting privileges now enjoyed by them, with but little hope for improvement in the future."

The Court reviewed the history of the two stations which would be deleted and found that in each case the "commendable career entitled it to consideration."

The Court further said:

> "It is not consistent with true public convenience, interest, or necessity, that meritorious stations like WBBM and KFAB should be deprived of broadcasting privileges when once granted to them, which they have at great cost prepared themselves to exercise, unless clear and sound reasons of public policy demand such action. The cause of independent broadcasting in general would be seriously endangered, and public interests correspondingly prejudiced, if the licenses of established stations should arbitrarily be withdrawn from them, and appropriated to the use of other stations."

We submit that the principle thus announced by the Court applies in the case at bar. Conceding, as stated by the Court, that all broadcasting privileges are subject to reasonable regulatory power of the United States and that public interest, convenience and necessity are the paramount considerations, the action of the Commission in the instant case deprives WIBO and WPCC of their broadcasting privileges, not only with little hope for improvement in the future, but with a direct order of present destruction. The order appropriates their privileges to another station and appellants' meritorious stations leave the air, with the injury to the public interest consequent upon the arbitrary action of the Commission. We repeat that the Commission stated (R. 1125) that "*The issue in this case is whether or not public interest, convenience and/or necessity would be served by the granting of*

this application and the consequent forfeiture of the facilities now assigned stations WIBO and WPCC."

We assert that this forfeiture is proposed by the Commission without any proceeding to revoke licenses and without clear and sound reasons of public policy demanding such action, grounded either in fact or in proper application of law, and that such forfeiture ignores the principles announced by the Court of Appeals.

In *Strawbridge & Clothier vs. Federal Radio Commission*, 57 F. (2d) 434, the Radio Commission refused the application of Station WFI, Philadelphia, Pa., for increase of power from 500 watts to 1,000 watts. The station operates on a frequency of 560 kc., sharing time with Station WLIT, another Philadelphia station. The 560 kc. regional frequency is the channel here demanded by WJKS of WIBO and WPCC. Strawbridge & Clothier (WFI) were interveners in the Court of Appeals (R. 12, 29) and their petition of intervention (R. 15) shows that WFI was not noticed as to the pendency of the application of WJKS here involved and was without opportunity to be heard. The intervention complains of the reduction in distance between Strawbridge & Clothier's transmitter on the 560 kc. which would result by the transfer of the 560 kc. frequency from the WIBO transmitter at Chicago to the WJKS transmitter at Gary, Indiana.

In the case appealed by Strawbridge & Clothier to the Court of Appeals, the Commission had denied the application of WFI on the grounds:

> (1) That the city of Philadelphia and surrounding area now receives a good broadcasting service; (2) that the granting of the application would result in objectionable interference be-

tween appellant's station and stations now operating on the same frequency; (3) that the granting of the application would likewise result in objectionable interference between appellant's station and stations upon the adjacent frequency of 570 kc.; and (4) that the public interest, convenience or necessity would not be served by granting the application.

The Court said:

"Appellant contends that the commission erroneously interpreted the provisions of the act of March 28, 1928 (c. 263, 45 Stat. 373), known as the Davis amendment, which provides that the licensing authority shall as nearly as possible make and maintain an equal allocation of broadcasting licenses, of bands of frequency or wave lengths, of periods of time for operation, and of station power, to each zone when and in so far as there are applications therefor; and that 'the licensing authority shall carry into effect the equality of broadcasting service hereinbefore directed, whenever necessary or proper, by granting or refusing licenses or renewals of licenses, by changing periods of time for operation, and by increasing or decreasing station power, when applications are made for licenses or renewals of licenses.' It is insisted that because Philadelphia is in an underquota State and an underquota zone it was the duty of the commission to reduce the power assignments of WQAM, WIBO, and WNOX to an extent that would avoid any interference caused by the granting of appellant's application.

"In its General Order No. 102, adopted January 8, 1931, the commission provided, in part, that 'an applicant from an underquota State in an underquota zone may apply either for facilities in use in an overquota State in that zone or

an overquota State in an overquota zone.' This provision obviously places upon an applicant the burden of proving that it would be for the public interest, convenience, or necessity to reduce the power of one station for the benefit of another. Many elements must be considered in the determination of that question. In the present case the commission has found that Philadelphia is now receiving good broadcasting service and that the granting of appellant's application would not materially better that service, but would materially affect the service of other stations. Appellant has entirely failed to prove that the reduction in power of the stations at Miami, Fla.; Chicago, Ill.; and Knoxville, Tenn., operating on the same frequency, would be to the public interest, convenience, or necessity. See *Reading Broadcasting Co. vs. Fed. Radio Com.*, 60 App. D. C. —, 48 F. (2d) 458, 59 W. L. R. 395; *KFKB Broadcasting Ass'n vs. Fed. Radio Com.*, 60 App. D. C. —, 47 F. (2d) 670, 59 W. L. R. 208.

"We are constrained to affirm the decision."

We submit that this most recent decision of the Court of Appeals is sound and should be substantially controlling in law on the disposition of the present case. It involves the application of General Order No. 102. The appellant, WFI, relied upon the naked proposition that a broadcaster in an under quota State could demand reduction of facilities in an over quota zone or State in the interest of equalization, but the Court adhered to the principle announced in the case of *Reading Broadcasting Company vs. Federal Radio Commission, supra.* It further said, in commenting upon General Order No. 102, that the applicant bore the burden of proving that it would be for the public interest, convenience and necessity to reduce the power

of one station for the benefit of another. The question involved did not go to the extent of the destruction of other stations for the aid of the applicant's station, but only to the reduction of power of the stations to be affected.

It is true that the Court sustained the Commission's action, but the application of the principle here should result in reversal of the Commission's drastic order now being considered. It can not be said that the applicant WJKS has sustained the burden of proving that it would be for the public interest, convenience or necessity *to destroy Stations WIBO and WPCC merely that Station WJKS may substitute the 560 kc. channel for its present 1360 kc. channel and secure, by virtue of such destruction, an additional three-sevenths time for operation of its station at Gary.* Petitioners have shown no substantial improvement of service for Gary and the Calumet region, or for Indiana; in fact, they claim the destruction of stations serving the very area in behalf of which they demand equalization of facilities. The Court of Appeals says that many elements must be considered in the determination of what is for the public interest, convenience or necessity, in the reduction of the power of one station for the benefit of another. Certainly many elements must be considered in the broader question of the entire destruction of two stations in order that another station may perhaps be benefited. We submit that all of the elements previously argued in this brief on the merits must be given full consideration, and that upon an application of the doctrine of the Strawbridge & Clothier case, this Court should decide that the Commission has erred, arbitrarily and capriciously, in making the order complained of.

With relation to the third ground stated in the Commission's denial of the application of WFI, quoted above, we refer to the testimony on behalf of Station WEAO, Ohio State University, Columbus, Ohio, operating on the adjacent frequency of 570 kc., offered in the case at bar (R. 52 *et seq.*) objecting to any shortening of the distance on the 560 kc. channel which would bring the transmitter on such regional channel nearer to Columbus than its present location at Stations WIBO and WPCC.

In *Journal Company v. Federal Radio Commission,* 60 App. D. C. 92 (48 Fed. (2d) 461), appellant appealed after its license had been renewed on the same power and frequency, but the Commission had granted a license to another station on the same frequency, causing such interference as to constitute, in effect, a refusal of appellant's application for renewal. Pending appeal the station made application for increase of power, which the Commission refused because of the interference it would cause with other stations. Appeal was also taken from that refusal, and interveners appeared. The Court of Appeals said:

> "We have determined * * * that radio transmission is subject to regulation. Technical Radio Laboratory vs. Fed. Radio Comm., 59 App. D. C. 125, * * *. The purpose of this regulation obviously is to prevent chaos and to insure satisfactory service. The installation and maintenance of broadcasting stations involve a very considerable expense. Where a broadcasting station has been constructed and maintained in good faith, it is in the interests of the public and common justice to the owner of the station that its status should not be injuriously affected, except for *compelling reasons.* Chicago Federation of Labor vs. Commission, 59 App. D. C.

> 333. Unless such a policy is maintained, the public will not receive the character of service which we are convinced the Radio Act was intended to insure. No station that has been operated in good faith should be subjected to a change in frequency or power, or to a reduction of its normal and established service area, *except for compelling reasons.*" (Italics ours.)

The Court held that appellant was entitled to some form of relief; that the Commission's decision as to interference was against the evidence; that "theory must give way to fact;" and remanded the case to the Commission with direction to afford appellant, after notice and opportunity to be heard,

> "such relief as will measurably reestablish appellant in the position occupied by it prior to the acts complained of."

What compelling reasons exist on the record in the case at bar justifying the Commission's decision? No compelling reason can be found in the mass of evidence warranting the *forfeiture* of the facilities of WIBO and WPCC solely in the interest of the applicant station. On the contrary, the evidence of WIBO and WPCC clearly shows protracted operation in good faith, and large investments; yet the Commission, reversing its Chief Examiner, relying upon its construction of the naked statutory provision regarding equalization and ignoring the cases decided by the Court of Appeals, arbitrarily transfers the facilities and ends the operations of WIBO and WPCC.

In *Great Lakes Broadcasting Company vs. Federal Radio Commission*, 59 App. D. C., 197, there was a controversy between several stations, which resulted in

action by the Commission making a division of time of two of the stations on the frequency involved and the assignment of a third station to another channel. The Court held that the apportionment of the time of the two stations on the one channel, however, was not only to be decided from the standpoint of public interest, convenience and necessity, but that, under the circumstances of the excellent service, large expenditures for meritorious programs, the popularity of Station WENR and its financial responsibility, it was "contrary to justice," to apportion the time as was done by the Commission, and the Court said:

> "*Nor is this a case where a newcomer seeks to appropriate the existing privileges of an established station.* The Commission found itself constrained by existing conditions to assign the two stations to the same channel, and the operating time should be divided justly between them." (Italics ours.)

The instant case is within the exception suggested by the Court in the language above italicized. WJKS, a newcomer to all intents and purposes, having enjoyed its existing privileges for approximately three years, abruptly undertakes to demand that it be awarded the existing facilities of two established stations. It is certainly in no better position than was Station WLS in relation to WENR. On the contrary, WJKS is in the position of Station WPTF, Raleigh, North Carolina, which applied for increase of power. Reviewing the action of the Commission in denying such application, this Court, in *Durham Life Insurance Company vs. Federal Radio Commission,* 60 App. D. C. 375 (55 Fed. (2d) 537), sustained the validity of the Davis Amendment as there applied by the Commission, and used this language:

> "Such increase, however, is not necessary to enable the station to render the same public service as heretofore, but its application is designed solely for the purpose of *increasing* its service area. The present issue, therefore, is not whether the station shall suffer the loss of any facility heretofore allotted to it, but whether it shall be granted an additional facility."

There is an obvious distinction between granting facilities, in relationship to quota control, and the withdrawal of facilities of established stations, in supposed aid of quota equitability. We deal, in the present case, not with some trifling increase in the Indiana State assignments prayed by applicant for its own benefit, in the supposed benefit of its State without effect upon established interests of others, but with inevitable expropriation of the facilities sought, to the grievous injury of others who have long enjoyed the grant of such facilities. Such action can be tolerated, as this Court has said, only for "compelling reasons," if at all.

As to the necessary reasonableness of the action of the Commission, see *Richmond Development Corporation vs. Federal Radio Commission,* 59 App. D. C. 113; and *General Electric Co. vs. Fed. Radio Com.,* 58 App. D. C. 386.

It is submitted that the Court of Appeals rightly has announced rules consistently requiring the Commission to avoid harsh decisions inconsistent with the natural rules of justice applicable to the rights of individuals whose conduct has been unquestioned and whose monies have been invested in broadcasting equipment and operations. Conceding the regulatory authority, the Court's judgments have been aimed at fairness of application of the law. The Commission

here is in conflict with the fundamental principles on which the Court has erected its decisions. See *Richmond Development Corp. vs. Fed. Radio Commission*, 59 App. D. C. 113.

For the purpose of this case respondents concede the power of Congress to regulate, and the authority of the Federal Radio Commission under existing statutes to act under the *reasonable* intent of the statutes, but assert that, as applied in this case, the Davis Amendment becomes unconstitutional, and General Order No. 102 is invalid as accomplishing a taking of property *without due process of law*, in conflict with the Fifth Amendment of the Constitution. The Davis Amendment and the General Orders thereunder can take validity only by the application of the principles announced by the Court of Appeals; and we submit, that the treatment of the equalizing provision as being mandatory in case of mere application for named facilities by an applicant in an under quota state works a wrongful taking of property, without such public ascertainment of the rights of all individuals affected as is consonant with distributive justice. The Davis Amendment should be administered to the end of ultimate equalization in future with fair treatment of all properly existing stations. This latter policy is suggested at the conclusion of the Commission's "Explanation of General Order No. 92" (R. 757), mentioning gradual improvement, as for instance, by the "going off the air" of financially unsound stations.

"A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score. U. S. *ex rel.* Attorney General vs. D. & H. Co., 213 U. S. 366, 408." Mr. Justice Holmes, speaking in U. S. vs. Jin Fuey Moy, 241 U. S. 394.

We submit that the decision of the Federal Radio Commission in this case, based upon improper construction and application of the statute and its own regulations, bends the Constitution to the breaking point.

CONSTRUCTION OF THE DAVIS AMENDMENT.

Fair and Equitable Allocation.

The Commission has dealt with this case capriciously and arbitrarily and against the evidence even in the light of its own views as to what the law is.

In the following we endeavor to demonstrate that the Commission's own views, as expressed in its general orders and its action here, are contrary to the Davis Amendment and are a distortion thereof.

As to proper construction of the Davis Amendment, we submit that the Commission has misconstrued the Congressional mandate. Both in General Order No. 102 and in its decision in this case, the Commission seems to treat allocation between States within a zone by the mandatory direction of Congress relating to the zones.

The law says, first:

> "That the people of all the zones established by section 2 of this Act are entitled to equality of radio broadcasting service, both of transmission and of reception, and in order to provide said equality the licensing authority shall as nearly as possible make and maintain an *equal allocation* of (1) broadcasting licenses, of (2) bands of frequency or wave lengths, of (3) periods of time for operation, and (4) of station power, to each of said zones when and in so far as there are applications therefor." (The numbers inserted are ours and are used to show

four elements which are to be as nearly as possible equally allocated to the zones. Italics ours.)

The next direction of the law is as follows:

> "and shall make a *fair and equitable allocation* of (1) licenses, (2) wave lengths, (3) time for operation, and (4) station power to each of the States, the District of Columbia, the Territories and possession of the United States within each zone, according to population." (Numbers and italics ours.)

The Court will note the last distinction between the two phrases employed. As to zones the Congress used the words "an equal allocation." As to the subdivisions within each zone, to wit, States, etc., the Congress used the phrase "a fair and equitable allocation."

As to zones Congress seeks an approximately mathematical division. As to States within zones Congress directs the application of fairness and equity according to population.

The law then says:

> "The licensing authority shall carry into effect the *equality* of *broadcasting service* hereinbefore directed, whenever necessary or proper, by (1) granting or refusing licenses or renewals of licenses, (2) by *changing* periods of time for operation, and (3) by *increasing* or *decreasing* station power, when applications are made for licenses or renewals of licenses." (Numbers and italics ours.) (There is no provision for forfeiture.)

This obviously applies to the zone allocations, since the word "*equality*" is again used, and cannot be taken to apply to States within a zone.

This construction is fortified, aside from the term employed, by the proviso in the same sentence. The proviso reads as follows (italics ours):

> "*Provided*, That *if and when there is a lack of applications*, from *any zone* for the *proportionate share* of licenses, wave lengths, time of operation, or station power to which *such zone* is entitled, the licensing authority may issue licenses for the balance of the proportion (*i. e., share*, or *equal allocation* as expressed elsewhere in the section), not applied for *from any zone*, to applicants *from other zones* for a temporary period of ninety days each, and shall specifically designate that said apportionment is only for said temporary period." (Italics ours.)

Plainly this means that the approximately mathematical equality of allocation to zones must be maintained, but, *in order to use all the channels of the air*, a merely temporary license may be awarded to any zone, in addition to its share, where not applied for, licensed, or used by some other zone. The mandate of Congress is, therefore, that such license shall be limited to three months and be immediately revocable for use in a zone entitled thereto should application come from such zone for that part of its equal allocation, share, proportion or apportionment, those being the four phrases used to indicate approximate mathematical equality amongst the zones.

The provision regarding temporary permits limited to three months is not made applicable by the statute to States within a zone, and there is no statutory sanction, based upon the provision respecting zones, which can subject a license, for instance in the State

of Illinois, to a three months' limitation because of the quota condition of another State in the same zone, as for instance, Indiana. Yet the Commission here applied for such limitation to the licenses of WIBO and WPCC last awarded.

At page 4 of its brief WJKS states that stations WIBO and WPCC accepted licenses restricted to three months' period "on a temporary basis, and subject to such action as the Commission may take after hearing on the application filed by WJKS." It must be remembered that stations WIBO and WPCC were well-established, existing stations which had not been charged with any violation and no steps had been taken to "revoke" their permits. As was said by the Court of Appeals in *Technical Radio Laboratory vs. Federal Radio Commission*, 59 App. D. C. 125:

> "The relief sought by an applicant for renewal is not limited to the issue of a license for three months only, but includes a continuing right to apply thereafter at proper times for successive renewals thereof."

There was no authority for limiting the permit, and the limitation was a step in the illegal attempt to *forfeit*.

In *Westinghouse Electric & Manufacturing Co. vs. Federal Radio Commission*, 60 App. D. C. 53, 54, the same attempt was made to limit a license to a ninety-day period, and the Commission was ordered by the Court of Appeals "to renew appellant's licenses from time to time • • • without the qualification in question." If an applicant complies with all the laws and regulations and its permit cannot be taken away without due process of law, to limit the permit when

granted to a period of three months until proceedings for taking the permit away without due process of law have been completed, is in itself a taking without due process of law.

Much is said of the Commission's right to *take* property in the instant case without compensation; but the fact is overlooked that it is being taken without due process of law.

The next paragraph of the Davis Amendment relates to award of broadcasting licenses for not more than three years, and to renewal thereof, and the last paragraph prohibits renewal more than thirty days prior to the expiration of the original license.

The Court will note that in General Order No. 102, in the third and fourth paragraphs, the Commission states that applications are pending

> "from under-quota states, which, under the law, are entitled to their *pro rata* share of radio facilities;"

and that the order as to applications is adopted

> "in order to bring about *an equalization* of these radio facilities *among the states in the zones.*" (Italics ours.)

This deals in the terms applicable to zones and not to States.

We submit that in this case the Commission has treated the provision applicable to equality between the zones as applicable to the States within a zone, and proceeds as if it were seeking approximately mathematical allocation between the States within a zone, rather than a *fair and equitable* allocation to the States

within a zone. In attempting fair and equitable allocation the Commission may be entitled to consider mathematical apportionment according to population; but there is no law requiring this formula, and such formula may and usually will result in a defeat of the fair and equitable allocation which the law does command regardless of densities of population and distribution thereof in States affected within the zone involved. Such certainly occurs in this case.

Certainly the attempt at mathematical allocation relied upon by WJKS and attempted by the Commission sion's decision violates, as hereinbefore argued, the very principle of fairness and equity in the instant case. It is manifest that the Congress in its wisdom realized that, while approximation of mathematical allocation among zones was possible, any such mathematical allocation amongst the States and subdivisions within a zone would foster the very evils which the Davis amendment attempted to avoid. The zone gets a mathematical division as near as may be possible; the States then receive therefrom a fair and equitable allocation.

Again we point out that, even with its attempt to make the mathematical allocation between the States within a zone, the Commission ignored its own mathematical allocation, so-called quota, of regional stations as between Illinois and Indiana, and resorted to the gross mathematical apportionment of all channels, cleared, regional and local, as between Indiana and Illinois within the Fourth Zone, in order to adopt a premise by which the unfairness and inequity of its action in the instant case could be premised in a supposed regulatory construction of the basic statute.

On the whole matter of construction and application

of the statute, it is obvious that the Commission's General Orders misconstrue the statutory distinctions between zones and States within the zones. They omit entirely the element of *reception* and deal solely with the element of transmission. The law says that "The people of all the zones are entitled to equality of radio broadcasting services, both of transmission and of *reception,*" and that to provide such equality the equal allocation of facilities to each of the statutory zones shall be made by the licensing authority. No consideration has been given, in any general order or rules of the Commission, to the element of reception.

The Commission in this case has ignored the fact that within the Fourth Zone, and as between Illinois and Indiana, the people of the latter State, and particularly of the Gary and Calumet areas, have the full benefit of reception and coverage from the stations in Northeastern Illinois. The Commission ignores the fact that it has a mathematical duty to perform only with respect to the zones, both as to transmission and reception, and confused as to its statutory duties, it attempts to apply such rule as between States within a zone, regardless of the fairness and equity commanded with respect thereto by the statute.

THE SPECIFICATIONS OF ERROR.

Dealing with the specifications of error listed in the Solicitor General's brief, it is pointed out:

1. The Court of Appeals not only did not err in holding, but did not hold, that the Federal Radio Commission does not have the authority, under the Act of March 28, 1928, in the exercise of its licensing power, "to lessen the gross disparity existing between the

broadcasting facilities of two States by granting a license to use the frequency assigned to the respondents, located in the over-quota State, to an applicant for such frequency in the under-quota State and declining to grant the license to respondents."

The Court of Appeals found (R. 1138), as the "statement" of petitioners in this Court admits to be true (p. 4, Petition herein), that station WJKS requested the "removal" of stations WIBO and WPCC; and the Court further found (R. 1139), as is borne out by the record (R. 1125) that the Commission in its decision stated the issue before it to be "the consequent forfeiture of the facilities now assigned stations WIBO and WPCC." It was not a question of "lessening gross disparity." The Court found (R. 1138, as borne out by the record (R. 1069 *et seq.*), that:

> "In the reallocation of 1928 following the enactment of the Davis amendment (act of March 28, 1928, 45 Stat. 373), the Commission found that conditions warranted the assignment of the frequency of 560 kc. to Station WIBO (originally established in April, 1925) and Station WPCC (originally established in July, 1924), and the assignment of the frequency of 1,360 kc. to Station WJKS (originally established in August, 1927). The evidence fails to disclose that there has been a material change in conditions since the reallocation of 1928."

The decision of the Court of Appeals fails to disclose any expression respecting authority or lack of authority to "lessen gross disparity" and no such "holding" can be here asserted as an error upon which this Court can be asked to aid petitioners in deleting stations WIBO and WPCC, or uphold their forfeiture.

2. Petitioners assert that the Court of Appeals erred

in holding that the action of the Commission was an arbitrary and capricious exercise of power.

The question of whether the findings were arbitrary and capricious has already been dealt with throughout this brief and it is submitted that the Court of Appeals was fully warranted in its findings.

There is no basis for the assertion in the brief of WJKS that "In the majority opinion of the Court below there is an almost total disregard of the evidence in the record which sustained the Commission; and the reference to the *preference* of the Court of Appeals for the conclusions of an employee of the Commission is unwarranted. At page 22 of the brief of WJKS, it is stated:

> "The court below refers to the use of phonograph records by Station WJKS, stating that although 'it seeks greater opportunity to furnish broadcasting service to the people of Gary * * *) it even now devotes two to three hours daily to broadcasting phonograph records. The innuendo of that statement to the effect that appellant seeks more time for community broadcasts, but now uses its time for phonograph records, is a part of respondent's brief below, but the *testimony* in the record does not justify it. The record shows that the two-hour period of phonograph records referred to is "from four o'clock in the morning until six."

We call this Court's attention to page 98 of the record which was before the Court of Appeals. Mr. Newman, Counsel for the Radio Commission, asked the witness Johnson (owner of WJKS) the question:

> "With regard to phonograph records, do you use them very often?"

The answer was

"We probably run—I couldn't exactly tell—probably two or three hours a day."

The statement that the *two-hour* period referred to is from four to six o'clock in the morning, is inaccurate, as it was not the *two-hour period* that was being referred to. The question asked by the Radio Commission's counsel brought out a question from the witness as to whether the counsel, in asking about early morning hours referred to the hours from four to six. (P. 99 of Record, fourth line.)

Specifications 3 and 4 urged as error by petitioners allege that the Court of Appeals erred in relying on certain findings of the examiner which petitioners claim are inconsistent with the findings of the commission. The language of the opinion of the Court of Appeals thus complained of is as follows:

> "After a careful review of the established facts, the examiner recommended that the application be denied. He found that the station is rendering a commendable public service on its present part-time assignment, but that the service 'would be improved by the installation of the most modern radio equipment and the operation of this station in the most efficient manner on its present frequency.' He further found that it is possible that 'more objectionable interference would result from the operation of station WJKS on the 560 kc. channel than now results from the operation of this station at Gary on the 1,360 kc. channel, since station WNOX at Knoxville, Tenn., is separated from Gary by a distance of only 440 miles, whereas the nearest station on applicant's present assigned frequency operating with 1 kw., is at Syracuse, N. Y., separated from Gary by a distance of 600 miles.' He also found that Stations WIBO and WPCC 'are meritorious stations, serving public inter-

> est, convenience and necessity'; that 'the owners and operators of these stations have at great cost prepared themselves to exercise the broadcasting privileges heretofore granted them by the Federal Radio Commission, and in the opinion of the examiner, clear and sound reasons of public policy demand that these broadcasting privileges be not taken from them and assigned to applicant station'; that stations WIBO and WPCC provide radio service for people within the service area of the applicant station, who also 'receive a large proportion of their radio broadcasting service from stations operating in the State of Illinois, *none of which service may be charged against the quota of the State of Indiana*'" (R. 1138-9).

A reading of the Court's opinion and the record discloses that the aforesaid language was used by the Court merely as part of its statement of the various steps which had been taken in the case before it reached the Court.

The opinion does not show that the Court relied on said findings of the examiner. On the contrary, the Court's opinion discloses that on an examination of the entire record the Court found that the order of the Commission forfeiting respondents' stations WIBO and WPCC was arbitrary and capricious. This finding of the Court is fully sustained by the record.

As to specifications 5 and 6 it is submitted that it has been shown herein that the Court's conclusions were sound and that the Court did not err in reversing the order of the Commission.

CONCLUSION.

It is respectfully submitted that in view of (1) the lack of any proceeding on the part of the Federal Ra-

dio Commission to revoke the permits of stations WIBO and WPCC; (2) the absence of any statutory power in the Commission to "delete," "remove," "forfeit" or destroy existing stations; (3) the failure of the statutes to give an applicant the right to demand the removal of existing stations solely on the ground of quota conditions; (4) the reallocation of 1928 under the Davis Amendment and the finding of the Court of Appeals that there has been no material change in conditions since that reallocation was made; and (5) the unreasonableness of any statutory regulation which would work the forfeiture requested, the judgment of the Court of Appeals of the District of Columbia should be affirmed, with costs taxed against the petitioner, Johnson-Kennedy Radio Corporation.

Respectfully submitted,

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APPENDIX.

General Order No. 102.

At a session of the Federal Radio Commission held at its offices in Washington, D. C., on the 8th day of January, 1931, the Commission adopted the following General Order:

Whereas, under the unit and quota figures adopted by the Commission, the First and Second Zones are under-quota and the remaining three zones are over-quota;

And whereas, there are a number of states that are over-quota and a number of states that are under-quota;

And whereas, there is now pending before the Commission a number of applications from under-quota states which, under the law, are entitled to their pro rata share of radio facilities;

Therefore, in order to bring about an equalization of these radio facilities among the states in the zones, the Commission adopts the following with reference to applications:

1. Where a zone has already in use its pro rata share of facilities, the Commission will not allocate any further radio facilities to that zone, which would increase its quota.

2. Applications from under-quota states in zones which have already allocated to them their pro rata share of radio facilities should be for a facility already in use in that zone by an over-quota state.

3. Likewise, where a state is already over-quota, the Commission will not allocate any further radio facilities to that state, which would increase its quota.

4. Applications from states which now have their quotas, or from states which are over quota, should be for facilities already in use in that state.

5. An applicant from an under-quota state in an under-quota zone may apply either for facilities in use in an over-quota state in that zone or an over-quota state in an over-quota zone.

The further questions of kilocycle and mileage separations should also be considered by an applicant in selecting the frequency to be applied for.

Since the Commission has classified stations in accordance with power into three classes, namely, clear channel, regional, and local stations, and has allocated certain frequencies for the use of each of these three classes of stations, applications should be for frequencies set aside by the Commission for the character of station applied for.

All applications now pending before the Commission which have not been heard or designated for hearing by the Commission may be amended by the applicants to conform to this Order.

This Order shall be effective on the day first above written.

FEDERAL RADIO COMMISSION,
JAMES W. BALDWIN,
Secretary.

Federal Radio Commission, Washington, D. C.

Explanation of General Order No. 102.

February 26, 1931.

General Order No. 102 of the Federal Radio Commission must be considered together with other Gen-

eral Orders of the Commission and its established policy. General Order No. 40 of this Commission designates six frequencies for use by local stations and restricts the nighttime power of stations of these frequencies to a maximum of 100 watts. The same General Order designates certain frequencies to be occupied by regional stations operating with powers of 250, 500 or 1000 watts at night. General Order No. 40, therefore, would prohibit the operation of a station using more than 100 watts power on any of the six local frequencies. The established policy of the Commission, based on what is believed to be sound engineering and economic principles, has been to authorize no 100-watt stations to operate at night on regional frequencies.

Applicants for construction permits for local stations (meaning stations operating with the power of 100 watts or less at night) are restricted to the six frequencies designated for that purpose by General Order No. 40 above referred to.

In the final analysis, and from a practical viewpoint, it appears that applications from states which have their quota, or more, of radio facilities assigned to them should, in general, be confined to facilities of a station, or stations, of the same class as that proposed to be constructed and/or operated by the applicant. That is, if the applicant applies for authority to construct or operate a local station in a state which has its quota, or more, the application should be to supplant a local station in that state. Applications for regional assignments should be made for the facilities of a regional station and applications for clear-channel assignments should be for the facilities of a clear-channel station.

In some cases, however, where facilities of one class can be installed without interference but the state and/or zone has its quota already assigned then applications may be made for all or part of the facilities of any station of any class in that state or zone. In this case the applicant should specify the facility which he desires to have transferred.

FEDERAL RADIO COMMISSION,
By JAMES W. BALDWIN,
Secretary.

Facts Pertaining to the Engineering and Technical Aspects.

Frank B. Falknor, radio engineer for applicant, WJKS, stated that the only observations by him in the Gary area were made between 7:30 and 9 p. m. on April 20 and April 21, 1931 (R. 159 and 161); he used uncalibrated instruments (R. 169); that the field strength of WJKS at a distance of 30 miles south of the transmitter was about 1.8 millivolts per meter, at which place there was detrimental audible interference of a strength which was at too low a level to measure (R. 159). At a point 30 miles southeast of the transmitter the signal strength was 3 millivolts per meter and interference was measured to be 0.2 millivolts per meter, being in the nature of an annoying beat note of 100 cycles per second (R. 159). Observations made near La Porte, Ind., 30 miles east of the transmitter, indicated interference in the nature of a 100 cycle per second beat note and a low flutter (R. 160). Falknor's observations made in the city of Chicago, about 30 to 35 miles from WJKS, showed in-

terference with that station due to heterodyne from 100 to 200 cycles, but the source of the heterodyne could not be identified (R. 134).*

Andrew D. Ring, engineer of the Federal Radio Commission, stated that stations of various powers would render the types of service at the distances indicated in the following (R. 117):

	Excellent City Service	Good Residential Section Service
100 watts	.....	13 miles
250 "	.....	20 "
500 "	6½ miles	25 "
1000 "	9 "	35 "
5000 "	18 "	60 "
10000 "	25 "	75 "
25000 "	35 "	90 "
50000 "	45 "	110 "

Witness Ring also testified that excellent city service is based on a field intensity of 10 millivolts per meter and that good residential section service is based on a field intensity of 2 millivolts per meter (R. 122). WJKS is a regional station (R. 122).

V. Ford Greaves, engineer of the Federal Radio Commission, testified that an engineering definition of a regional station classification is one in which the

* Some effort to prove interference as well as the need of more time was made by applicant in twenty-three depositions (R. 663-731). These depositions were under order of the Commission (R. 232) but notice was not delivered to WIBO at Chicago until the morning of April 20, 1931, the day of the hearing set for 1 p. m. and did not reach Nelson, the manager, until 2:30 p. m. (R. 235).

The Chief Examiner admitted the depositions despite question as to sufficient notice but found most of the testimony therein inadmissible as offering only personal opinion and there having been no cross-examination.

These depositions were made in response to stock questions by Johnson, the proprietor of the station, among the questions being whether Gary needed full-time broadcasting for the community, whether interference was heard, and whether change of frequency would be beneficial. The affidavits were not signed but bore the notarial jurat. The commission did not rule on admissibility but stated that the affidavits were not considered in its decision.

service area is restricted by unavoidable interference (R. 387).

Ring testified that the following are the stations assigned to 1360 kc. and adjacent channels which might be capable of causing interference with WJKS on its present assignment, and gave the actual distances between these stations and WJKS, and the recommended separation of the Engineering Division of the Federal Radio Commission as follows (R. 120):

Station	Location	Night Power	Approx. Distance from WJKS	Frequency	1200 miles 1050 " Recommended Separation
WFBL	Syracuse, N. Y.	1000 w.	600 miles	1360 kc.	
WCSC	Charleston, S. C.	500 w.	750 "	" "	
KWK	St. Louis, Mo.	1000 w.	260 "	1350 "	350 "
WRJN	Racine, Wisc.	100 w.	90 "	1370 "	210 "
WGL	Ft. Wayne, Ind.	100 w.	115 "	" "	" "

Witness Falknor made no measurements of strength of signal from interfering stations at the 9 mile and 30 mile radius (R. 170), nor a field strength survey to show coverage of WJKS on 1360 kc. (R. 170).

T. A. M. Craven, expert engineer, testifying in behalf of respondent WIBO, whose qualifications were stipulated by appellant WJKS, has had over 18 years extensive practical experience in radio matters with particular reference to allocation engineering (R. 304). He stated in effect that the determination of interference and its useful interpretation on a common basis of comparison requires much precaution and a setting forth of the observer's standards, as well as the obtaining of sufficient data relative to the efficiency of the transmission system, in addition to the taking of field strength measurements with properly calibrated instruments over a reasonable period of time (R. 305, 306 and 307).

No comparisons were made by Witness Falknor to

check accuracy of the calibration of the instruments used in making field strength measurements (R. 169). There was no microammeter in the plate circuit of the receiver detector, and Falknor depended solely on the volume indicator for accuracy of measurements (R. 170).

As to the accuracy of field strength measuring equipment, using no meter or measuring device in the receiver detector and depending upon a volume indicator at the receiver output to compare microvolts per meter, the Witness Craven testified that he would require a check of its performance against proper laboratory standards and that without this check he could not accept any such instrument as being accurate, because his experience has been that it is better practice to determine the strength of radio frequencies in the detector input rather than in the output of the measuring receiver instrument (R. 319).

With respect to a field strength of 3 millivolts per meter at a distance of 30 miles from a 1 kw. station having a T type antenna 90 ft. horizontal and 75 ft. vertical, separated by noninsulated metal towers 125 ft. apart (the antenna described in the application of WJKS), the Witness Craven testified that either the absorption is negligible, or that the absorption is average or large and the station is more than efficient for the type of antenna used, or that the equipment used to measure the field strength was not accurate, or that an error might have been made in the observation, or that insufficient observations were made, or that there may have been sky wave radiation, and that in any case the setup does not represent the average condition (R. 319).

Witness Falknor made no measurements and did not know the antenna characteristics at WJKS (R. 171),

and made no scientific check of transmitting equipment and could not account for apparent excessive loss in the power amplifier (R. 172). He testified that he had not made sufficient examination of the transmitter and antenna system at WJKS to know to what extent an improvement in the transmitter would increase the signal strength (R. 177). Witness Falknor stated that the power output, if doubled, would have the effect of pushing the interference farther away from the transmitter and would actually reduce the volume of interference (R. 179 and 180).

Craven testified that an antenna of the T type, approximately 90 ft. horizontal and 75 ft. vertical, supported by metal towers 125 ft. apart, not insulated from the ground, would have losses in comparison with the latest engineering practice, and that moving towers farther apart should improve the situation (R. 318). (The application of WJKS shows this to be the type of antenna used at that station.)

Ring testified that any change in the equipment of the antenna system of WJKS whereby the energy is radiated more on the horizontal plane would undoubtedly result in improvement of the service of the station (R. 131), and that interference from cross-talk within the good service area of a station may be corrected either by increasing the signal of that station until the interference is no longer noticeable, or by eliminating the source of the interference (R. 132).

Craven, in listing the factors involved in antenna losses, and outlining the general methods of minimizing the effect of such losses, testified that the engineering profession generally recognizes that local conditions at the site of the transmitting station have a profound effect upon the efficiency of antenna structures, both from the standpoint of interference and of service

(R. 308, 309 and 310), and that the efficiency of an inefficient transmitter could be increased with respect to its radiated power by the selection of a better side, by eliminating losses in the antenna system, by eliminating losses in the transmitter, or by increasing the effective height of the antenna or by utilizing an antenna system in which the energy lost in the sky wave is at a minimum (R. 312); that unsatisfactory or objectional heterodyne interference would be reduced considerably if stations using the same frequency adhere more closely to the frequency assigned (R. 315).

Falknor for applicant testified that he made no measurements of any station in the Gary area with the exception of WJKS and 1360 kc. (R. 169 and 171), and no scientific investigations on 560 kc. in the Gary area to determine the nature of interference that might be expected on that frequency, nor were measurements made of the field strength in microvolts per meter in Gary of stations on channels adjacent to 560 kc., or any stations except WJKS on 1360 kc. (R. 171).

The following is a tabulation of the Witness Ring's testimony with respect to the stations on the same and adjacent channels to which WJKS, if assigned the frequency of 560 kc., might cause interference, or from which WJKS might receive interference (R. 120, 121 and 122):

122):

Station	Location	Night Power	Approx. Distance from WJKS	Frequency	Recommended Separation
WNOX	Knoxville, Tenn.	1000 w.	440 mi.	560 kc.	1200 mi.
WLIT	Philadelphia, Pa.	500 w.	670 "	" "	1050 "
KFBM	Beaumont, Tex.	500 w.	900 "	" "	" "
KLZ	Denver, Colo.	1000 w.	920 "	" "	1200 "
WEAO	Columbus, Ohio	750 w.	250 "	570 "	350 "
WKRC	Cincinnati, Ohio	1000 w.	225 "	550 "	350 "
KSD-KFUO	St. Louis, Mo.	500 w.	270 "	" "	300 "

Ring testified that the recommended separations were made up as an average thought best applicable to the entire country, although it is well known that various parts of the country vary somewhat. In the central part of the country, particularly the Mississippi Valley and the lower lake region, the recommended distances are too small, if anything (R. 129).

The Witness Ring also testified that generally speaking, if a station changes its frequency from 1360 kc. to 560 kc., and in each case adjusts its equipment to maximum efficiency of radiation, the average listener would probably not notice a great difference in volume unless there were conditions present that changed the absorption factor in the particular frequencies (R. 128).

The Witness Greaves testified that the difference in interference between two stations 600 miles apart operating on 1360 kc., and the interference between two stations at the same distance on 560 kc., would be so slight that the average listener could not tell the difference (R. 378).

Craven, testifying in behalf of WIBO, stated in effect as follows:

Investigations regarding regional channel radio stations involved in changes of frequency to avoid interference should be comprehensive and thorough and should show conclusively the following (R. 305 and 306, also Examiner's Report 1089):

(*a*) The sources, degree and character of the interference and that this interference is consistently greater than that usually encountered in the service of regional stations in general.

(*b*) Field strength contours of a station applying for a change in frequency should show whether or not

the service being rendered is equivalent to the average to be expected with respect to signal strength.

(*c*) The efficiency of the applicant's equipment and installation as well as the location, should show whether or not an improvement in the ratio of the service signal to that of the interference could be accomplished by changes in the applicant's equipment or location.

(d) A survey of the interference conditions on the frequency applied for should show conclusively whether or not the proposed shift will be materially beneficial in the locality of the applicant station.

(*e*) Sufficient data should be submitted to permit an estimate as to whether or not the proposed shift in frequency at the applicant station will change materially the interference to other stations.

(*f*) A description of the apparatus and methods employed in making the investigations should be submitted in order that the resulting measurements may be interpolated with known standards in order to arrive at accurate comparisons.

The pertinent facts pertaining to "quota" are tabulated herewith from the testimony of A. D. Ring and V. Ford Greaves, engineers of the Federal Radio Commission:

	Illinois	Indiana
Total Units Due	22.50 (R. 107)	9.53 (R. 108)
Total Units Assigned	33.65 (R. 123)	7.58 (Deduced from R. 108 & 113)
Units Over or Under Quota	11.15 over (R. 111)	1.95 under (R. 113)
Percentage Over or Under Quota	49% over (R. 111)	20% under (R. 113)
Regional Units Due	7.31 (R. 122 & 383)	3.10 (R. 122)
Regional Units Assigned	2.95 (R. 122 & 383)	2.53 (R. 122)
Regional Units Over or Under Quota	4.36 under (R. 122)	.57 under
Percentage Over or Under Quota in Regional Facilities	60% under	18% under

The deletion of WIBO-WPCC from Illinois would reduce the assigned quota figures of Illinois by .69 units (R. 111 and 383).

The granting of the application of WJKS would increase the quota figures of Indiana by .45 units (R. 111).

Changes in quota figures from January 6 to April 13 were caused by adding facilities to Indiana (R. 115).

The State of Illinois is over quota in total facilities but under quota in regional facilities (R. 383).

The quota of Indiana is not charged with the good service that State receives from clear channel radio stations in Illinois assigned to the Fourth Zone, in which Indiana is a part (R. 393).

The Witness Greaves testified that from a purely engineering point of view a signal of a given field strength is service independent of the type of program and on that basis is appears that Gary is already served with a sufficient number of microvolts from stations in the vicinity to give a large variety of service (R. 382).

The Witness Ring testified that northern Indiana is estimated to be in the good service area of several of the Fourth Zone clear channel stations (R. 123).

The Witness Falknor testified that the Calumet region, in part, also receives service from Stations WOWO in Ft. Wayne, Ind., WWAE at Hammond, Ind., and from a 100-watt station at LaPorte, Ind. (R. 165 and 166).

Public Interest, Convenience and Necessity Served by the Stations.

A mass of evidence was adduced regarding the programs furnished by the three stations, both by the

testimony of witnesses and the inclusion of programs as exhibits, Stations WJKS offering programs of practically every other station in Chicago, as shown on applications for licenses therefor, to indicate similarity of services contrasted with WIBO.

Station WJKS.

The testimony of Thomas J. Johnson (R. 62 *et seq.*) was to the effect that WJKS broadcasted locally, in the interest of Gary and the Calumet District, its transmitter being located at the Gay Mill Ball Room, on the shore of Lake Michigan, and intended to reach the Calumet District, extending from Gary and Southern Lake Michigan shore points to South Chicago, the largest steel manufacturing center in the world, with a population of 110,000 people in Gary and between 800,000 and 1,000,000 people in the Calumet Region, about 60 per cent of the population being foreign born and representing sixty odd different nationalities. The service was intended to present programs in their own languages, presented by their own people (R. 63). There was a weekly colored program, presented by colored artists, and in addition Hungarian, Italian, Mexican, Spanish, Germans, Russian, Polish, Croatian, Lithuanian, Scotch and Irish weekly programs of a musical, and educational character and instructive in citizenship, with no charge made therefor (R. 64). There were also programs in cooperation with the school officials, teachers, and the parent-teachers' associations (R. 65). The steel mills run continuously for 24 hours a day, on three shifts and, therefore, according to the testimony, there are requests for programs during the entire day (R. 65) and owing to the limited

time assigned to the station "we are unable to put on as many of the programs as we would like."

The station broadcasts from 6 or 7 A. M. to 8:30 A. M., 11 A. M. to 4 P. M., 7 P. M. to 9 P. M., 10:30 P. M. to 12 P. M., and on Monday, Tuesday, Wednesday and Saturday continues broadcasting until the early hours of the morning (R. 65).

The Gary School System consists of thirty-five public schools and parochial schools, with 30,000 children attending. There are 15 school bands and each of the fifteen bands broadcasts regularly over WJKS. Each of these bands has its own time for broadcasting, and that has been continued ever since the station has been licensed (R. 67). Another school feature is the broadcasting of the sport events, such as baseball, basket ball and foot ball. There is a feature known as "Learn to speak English" (R. 69). Irrespective of grades, up to the age of 16, school children have various groups and various plays, any child not up in his studies not being permitted by the teacher to broadcast that week, and remarkable improvement in studies has been found because they have the encouragement of the teachers and parents, the latter feeling proud to have their children broadcast. Children, especially of the 4th 5th and 6th grade, prepare their own material and participate in debates, such as "Resolved, That Thomas Edison has done more for humanity than Henry Ford;" and on the question "Are independent stores of more advantage to the community than chain stores?" There are school playlets broadcast over the radio station. The Witness Johnson testified that the people in his service area are delighted with such programs (R. 70-71). On some Saturdays the station has 200 children all trying to get on during two or three

hours (R. 71). The station gives time signals and weather reports, arrival and departures of vessels carrying ore to the steel mills, and there is a safety program furnished by the safety inspector of the steel mills (R. 73). There are police broadcasts, lost child broadcasts, and drives for the Red Cross, Salvation Army and other charities (R. 75). There is a nightly broadcast of the Elks Toast (R. 75). There are Sunday religious services, commencing at 10 o'clock, from the Central Baptist Church; at 1 o'clock "The Bread of Life" (R. 75), at 4 o'clock every Sunday the various churches have half-hour programs, covering all the churches of the community that wish to participate. There are evening services by the Presbyterian Church. The church is also used by Father Costello for services by the Gary-Bishop Aldering Settlement House (R. 76).

The Witness Johnson testified that the station had never been operated for profit; all money taken in is used for salaries of employees or talent and not a dollar has been taken for profit, the owners feeling that they are amply paid if good has been done for the community (R. 81).

The Gay Mill Ball Room is owned by the Johnson family, as a dance hall and restaurant. It is announced every fifteen minutes during the summer season. They also have cottages. See (R. 80, 85) and WIBO Exhibits 18-A, 19-A and 20-A (R. 941, 942, 943) being photographs of the Gay Mill Ball Rom, where the transmitter of WJKS is located.

Johnson testified that the purpose in securing more time would be to increase the programs of the same character, the station having demands to fill up every half-hour and every fifteen minutes of the day if given

more time for community programs. Johnson stated that they used phonograph records probably two or three hours a day, principally in the morning (R. 98), and that *from 4 to 7 o'clock in the morning the time was used only occasionally* (R. 94).

Frank Morrow, Program Director of Station WJKS, testified (R. 249 *et seq.*) and introduced copies of the station log, over the objection of counsel for appellants that the originals should be produced (R. 250). The thought behind all programs was to make WJKS a community station (R. 272). The witness testified as to the use of phonograph records (R. 282). The studio staff did not, to the knowledge of the director, pay any talent, and the entertainment was furnished by the regular staff of the station (R. 287). The program director stated that he prepared the programs; that programs were published in Chicago papers, which he had never seen; that he complained to Mr. Johnson and was told that this would be stopped (R. 292, 293). Publication of programs in the Gary Post Tribune did not correspond with the station log (R. 296-298).

The program director stated that spot announcements, under advertising contracts, were made without attention to program arrangements, disrupting programs entirely (R. 299). Such spot announcements were shown to occur approximately every five minutes. (See R. 299-301 and exhibits, R. 765-771.)

Station WIBO.

The program policy of Station WIBO was proved by James R. McPherson, assistant general manager in charge of programs (R. 338 *et seq.*) with the productiion of statiion logs (Exhibit 10-A, 771-909).

The station showed between 300 and 400 program changes a week (R. 339) and was affiliated with the National Broadcasting Company for chain program broadcasting, part of the chain programs being without compensation and part paid for by WIBO to provide better quality and diversification of entertainment. Ten musicians are employed in the station orchestra, and by affiliation with the Publix-Balaban & Katz Theaters the station has access to good talent of great popularity. Symphonic orchestral music is broadcast by remote control from theaters connected with the Publix-Balaban & Katz Theaters, the largest chain of moving picture theaters in Chicago, representing 25,000,000 admissions per annum (R. 340). Theater patrons are invited to tune in on WIBO and WIBO announces brief reviews concerning pictures exhibited throughout the city and refers to the Chicago Evening American reviews (R. 340-41). By affiliation with the Chicago Evening American WIBO programs reach 2,000,000 people per day through the newspaper, which has the largest evening circulation in Chicago (R. 342).

WIBO broadcasts weather and flying information and has given special attention to aviation matters. It uses a daily 15-minute period for health and physical education broadcasts and a similar period for cooking, home economics, home decorations, etc. (R. 342-43). Advertising accounts have been refused because they interferred with allotments of time, because of undesirability of programs, and in the interest of the highest standard of service or because they would be objectionable to listeners. Figures in national and public life have been featured on programs (R. 344). The first public broadcast of operatic per-

formances from the stage of the Chicago Civic Opera was heard over WIBO (R. 344-45).

Nine religious broadcasts occur using ten hours per week (R. 341). Sports broadcasts are thorough, covering baseball games, Northwestern University Football games throughout the season, and the Notre Dame-Army game, together with yachting and other sports (R. 348).

WIBO operates in conjunction with Television Station W9XAO, participates in experiments being conducted by the Western Television Corporation, owners of W9XAO, and assists in the preparation of television programs (R. 349).

Phonograph records are used from one and a half hours to two hours, confined to morning broadcasts. Reference is made to Exhibit WIBO 13-A (R. 910-936) regarding newspaper announcements of WIBO program features, together with photographs of station and broadcasting equipment.

F. M. Russell, Vice President of the National Broadcasting Company, showed that the daily amount of sponsored or commercial programs taken by various N. B. C. outlets in Chicago in a given month was 7 hours and 28 minutes; 8 hours and 4 minutes of sustaining programs; 2 hours and 13 minutes of institutional programs; or a daily average, for March, 1931, of 17 hours and 45 minutes, of which WIBO, one of these outlets, used 2 hours, 36 minutes commercial programs, 2 hours, 19 minutes sustaining programs and 33 minutes institutional programs, or a total of 5 hours, 18 minutes (R. 374). Slightly less than half of the programs originated by the National Broadcasting Company found their way into the city of Chicago by stations operating therein, and it is assumed

that approximately all of the programs, whether sponsored, sustaining, or institutional, instituted by the company, are adapted to the Chicago area (R. 374-5).

WIBO was affiliated with the Chicago Evening American, an evening newspaper having the largest circulation in Chicago and the second largest in the United States, as testified by William J. Clark, Radio Editor (R. 184). The reciprocal arrangement was that the newspaper was to serve the broadcasting station and the station was to announce the newspaper, twice a day in connection with WIBO station announcement, the newspaper to furnish spot news flashes, cooking and household information from its cooking department and laboratory kitchen in the Hearst Building (R. 186). The newspaper furnished market reports, news bulletins, etc. Fifteen minute broadcasts are made by the newspaper's expert on cooking, home economics, etc., and letters from listeners are answered, literature and information sent, etc. (R. 186). The facilities of the Evening American editorial and newsgathering forces were at the command of WIBO (R. 190), with reciprocal advertising.

Spot announcements over WIBO are eleven in a day (R. 366).

Station WPCC.

Station WPCC is licensed for twelve hours on Sunday only, but by an agreement for division of time with WIBO, Station WIBO uses the time from 12:30 to 4:30 o'clock and from 7 to 8 o'clock on Sundays, and in return WPCC, by remote control, broadcasts over the WIBO transmitter, from the church, from 12 to 12:30 o'clock P. M. each day; on Monday from 7

to 7:30 P. M.; on Tuesday from 7:30 to 8 P. M.; and on Friday from 6 to 6:30 P. M. (R. 137).

The Sunday morning program of WPCC furnishes the International Sunday School lesson, followed by the organ, the choir, congregational singing and the sermon. From 6 to 7 o'clock Sunday evening choirs and special singers furnish the program, without speaking, unless some visitor to the city speaks. At 8 o'clock P. M. Sunday the evening service is broadcast, with congregational singing and sermon, and at 9:30 P. M. a request program is furnished, for one hour and a half. The weekday broadcast consists of special musical programs and a fifteen-minute sermon (R. 137). At 12 o'clock occurs, daily, the WPCC class broadcast over the WIBO transmitter. This class consists of thousands of registered members who support the church in relief work and the maintenance of five missionaries in the foreign field. The class has a membership in nine States and Canada.

The Monday evening period includes a sermon on prophecy. Tuesday evening there is an exclusively high-class musical program. On Friday evening there is an evangelistic or Bible exposition for 30 minutes. Politics are excluded; there are no book reviews, and the work is of a spiritual nature and primarily nonsectarian. The preaching is "Old fashioned orthodox." The call letters stand for "We Preach Christ Crucified"; "We Preach Christ Continuously"; and "We Proclaim Christ's Coming" (R. 138).

The church commenced broadcasting in July, 1924 (R. 145). The church was then largely in debt. The church budget is now two to three times what it was before the radio was installed. The church has more than trebled its audiences. It is engaged in charitable

and relief work. The station experimented with broadcasting in foreign languages, but found that it was a failure; and Rev. J. C. O'Hair, manager of the Radio station, testified that he did not believe it could be successfully worked in any district. In Chicago there is a greater number of foreigners than in Gary. He said he was not overstating the fact when he said that 20 per cent of the church's radio income originates with foreign born people who seek to support the work (R. 140-141). The church disbursed in regular work between $42,000 and $43,000 in 1930 (R. 142). There are twenty radio stations in Chicago, broadcasting about 60 religious hours total on Sunday; but during the week, of 512 hours, or approximately 500 hours broadcasting, there are no weekday spiritual programs except WPCC's broadcasts over WIBO. WMBI, Moody Bible Institute, Addison, Ill., broadcasts religious programs, but only in the daytime, with no evening hours. WPCC maintains the only charitable relief. The Moody Bible Institute has 3,600 missionaries from among their graduates in the foreign field, trained in their school, many of whom are interested in the work as the result of radio broadcasting, but the Moody Bible Institute does not undertake to support such missionaries. WPCC supports its missionaries through its radio listeners (R. 143-144).